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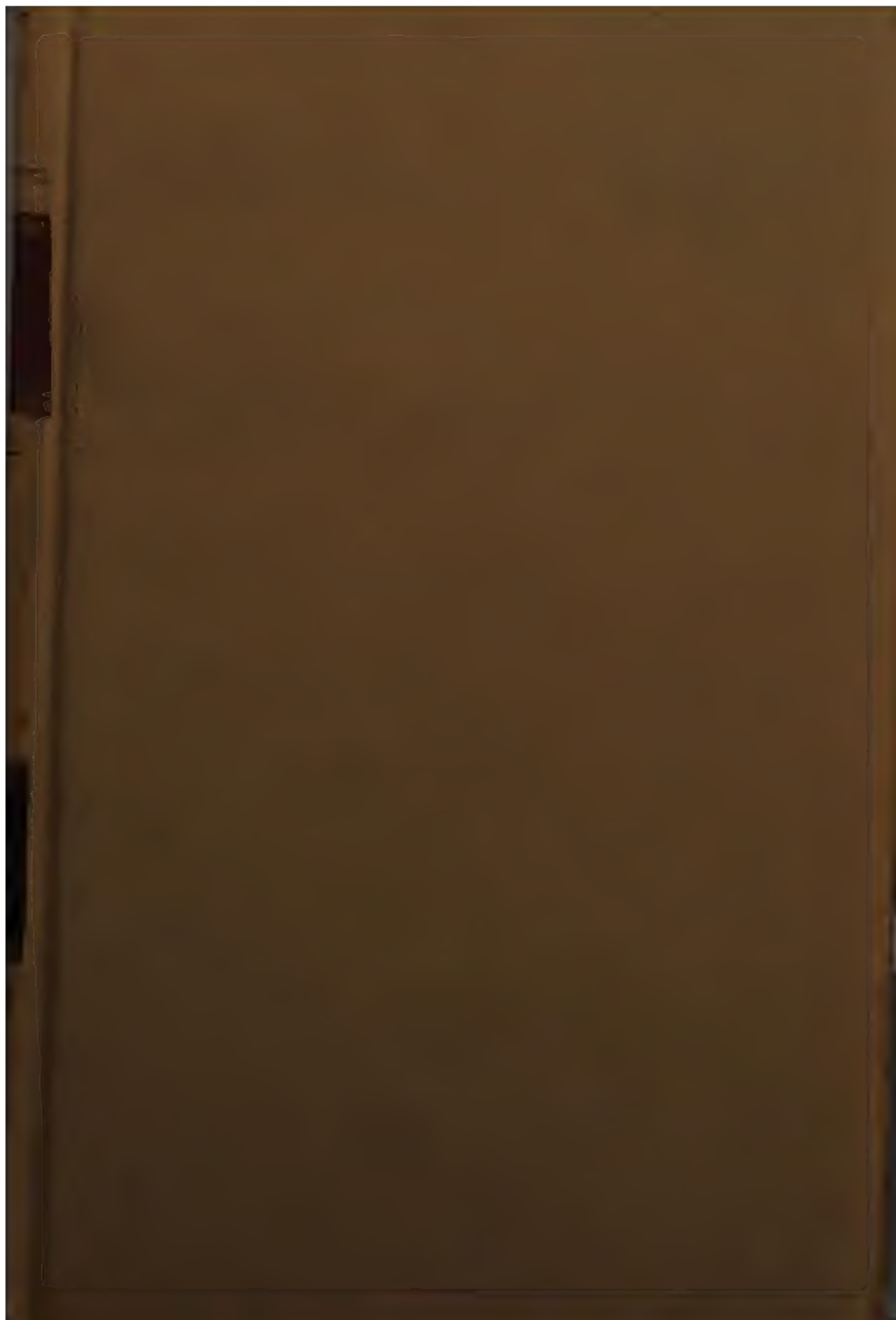
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NEW JERSEY EQUITY REPORTS.

VOLUME XXXV.

STEWART 8.

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REPORTS *cf*

—OF—

2098

CASES DECIDED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

The Court of Errors and Appeals,

OF THE

STATE OF NEW JERSEY.

JOHN H. STEWART, REPORTER.

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NOTE.

This volume contains the opinions delivered in the Court of Chancery and Prerogative Court at the February and May Terms, 1882, and also those on appeal at the March and June Terms, 1882.

By the Chancellor's direction, the following opinions have not been published :

***Feb. Term, 1882*—Paterson v. Brownell ; Perrine v. White.**

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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

FEBRUARY TERM, 1882.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAHAM V. VAN FLEET AND AMZI DODD, ESQS., VICE-
CHANCELLORS.

SAMUEL POPE and wife

v.

JAMES BELL.

1. A preliminary injunction granted to prevent the alleged violation of a building covenant in a deed will be continued, in a case where the proper construction of such covenant cannot be judicially determined until the final hearing.

2. Complainant owned a lot with a building thereon, seventy-five feet in depth, with a cellar beneath, a store in the first story, and a large room, known as "Pope's Hall," in the second story. Complainant's wife owned the adjoining lot, which was on the corner of another street, with a building thereon, running back fifty feet along complainant's building. In that part of complainant's building extending beyond that of his wife, there were two windows in the wall of the cellar, two in the store and two in the large room

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or hall. Complainant and his wife conveyed her lot and building to the defendant, by a deed reserving a strip of land three feet wide across the rear of the lot so conveyed, to the street, for the purpose of carrying off the water and sewages from the said hall; and containing a covenant "that nothing shall be built or erected on the said lot to obstruct the light of the said Pope's Hall." There was a space of twenty-five feet between the building on the front of defendant's lot and the building on the rear of it; and on that space defendant began to erect another building, sixteen feet high, covering the greater part of such space. An application to dissolve, on bill and answer, a preliminary injunction restraining defendant from erecting such building, on the ground that defendant's covenant only prohibited his obstructing the light of the windows in the hall itself (which defendant claims his new building will not obstruct), and not those in the store and cellar, was refused.

Bill for injunction. Motion to dissolve. On bill and answer.

Mr. A. B. Woodruff, for the motion.

Mr. D. B. English, contra.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendant from violating his covenant contained in a deed given to him by the complainants for a lot of land in Paterson. That lot is on the corner of Market (formerly Congress) and Prospect streets, and adjoins on the east a lot which, at the date of the deed, was, and ever since has been, owned by the complainant, Samuel Pope. The property conveyed to the defendant was owned by Mrs. Pope. On Mr. Pope's property there was, as there still is, a building of seventy-five feet in depth, fronting on Market street, in the second story of which there is and was a large room or hall, known as "Pope's Hall." In the middle of the first floor of the building was the entrance to the hall, and on each side of the entrance was a store. There was a cellar under the building. On the lot conveyed to the defendant there was a building of three stories, also fronting on Market street, and extending back fifty feet alongside of Pope's building. On the west side of the part of Pope's building which

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extended beyond the defendant's, there were windows, two in the cellar wall, two in the wall of the first floor and two in the wall of the large room or hall. Each lot is one hundred feet deep. The defendant's deed contains the following reservation and covenant: "And the parties of the first part do hereby reserve out of the above-described property a space of three feet wide, running from the rear of Pope's Hall, or where the water is taken from the said hall across the said lot to Prospect street, for the purpose of carrying off the water and sewages from the said hall; and also that nothing shall be built or erected on the said lot to obstruct the light of the said Pope's Hall." On the rear of the defendant's lot there was and is a building, and between his two buildings there was a space of twenty-five feet. On that space the defendant is now erecting a building sixteen feet high, to cover the greater part of it, and the complainants seek to restrain him, on the ground that his action in so doing is in violation of the covenant, and will inflict irremediable injury on Mr. Pope, by darkening the windows of his building overlooking that space. The defendant, by his answer, insists that the covenant has reference, not to all the said windows before mentioned, but only to the two windows of the hall itself, and therefore that the obstruction of the light, so far as the windows in the cellar and first story are concerned, is not within the covenant; and further, that if it has reference to them, the proposed building will not be a greater obstruction to the light than the erections which were on that part of the lot when the conveyance was made. The complainants, it should be stated, allege that that part of the lot was then vacant. The bill is verified by the oath of Mr. Pope alone, and therefore the defendant must, on this motion, rely on his own oath alone as verification of the answer and in support of the motion. *Merwin v. Smith*, 1 Gr. Ch. 182; *Gariss v. Gariss*, 2 Beas. 320; *Mulock v. Mulock*, 11 C. E. Gr. 461. On the bill, the complainants' right to relief by injunction is very clear. *Kirkpatrick v. Peshine*, 9 C. E. Gr. 206. The answer, while it admits the existence of the covenant, denies that the construction put upon it by the complainants is the proper one, and insists that

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if it is, there is no appreciable injury ; and if there be, that the complainants have an adequate remedy at law. The decision of the cause will principally depend on the conclusion to be judicially reached as to what is to be understood by the designation "Pope's Hall," whether it is the whole building or only the room so called, and that question cannot be decided satisfactorily or with justice to the parties at the present stage of the suit. It should be left until the final hearing, and the injunction retained accordingly. The motion will therefore be denied, with costs. There will, however, in order to bring the cause to a hearing speedily, be a reference to a vice-chancellor, if it be desired.

IRA M. HARRISON

v.

JOSEPH T. FARRINGTON.

Defendant was residing with his family, in the house of his mother, in this state, for the summer. His own house, in New York city, was open during the summer, and in charge of a servant. He returned to New York with his family in October.—*Held*, that leaving a copy of a *subpœna ad respondendum* for him, at his mother's house, in September, was a good service, it being "his dwelling-house or usual place of abode."

On bill. Motion to set aside service of *subpœna ad respondendum*. On order to show cause.

Mr. S. C. Mount, for the motion.

Mr. J. W. Taylor, *contra*.

THE CHANCELLOR.

The service of the *subpœna ad respondendum* appears to have

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been made by leaving a copy thereof at the dwelling-house in Caldwell, in Essex county, where the defendant was at the time living for the season with his family. The service appears to have been made on the 10th of September. The defendant testifies that he went with his family from New York city to Caldwell to reside in that house (it was his mother's, and he owned a farm near by) about the first of June, and stayed till the early part of October. He had lived there in summer for the two previous years. His house in New York was open during the time, and in charge of a servant. The copy of the writ appears, from the testimony, to have reached his hands at

NOTE.—In *Thomas v. Earl of Jersey*, 2 Myl. & K. 398, a copy of the bill left at defendant's town house, on January 16th, although he was abroad, and had been since the preceding November, was deemed a valid service.

In *Davidson v. Marchioness of Hastings*, 2 Keen 509, service at the dwelling-house in London of a peeress of Scotland, who was then absent in Scotland, and claimed to be domiciled there, was held good.

In *Att'y-Gen. v. Stamford*, 2 Dick. 744, a peer was in the country, and was there served with a subpoena, but both houses of parliament being then in session, it seems, he was considered to be in town.

In *McDonough v. McCartney*, 3 Irish Com. Law 239, service at defendant's home in Dublin, while he was in London attending to his parliamentary duties, was deemed insufficient.

In *Evans v. Payne*, 30 La. Ann. 498, where a defendant resided alternately in different parishes, a service in either of them was held good. See *Gilman v. Cutts*, 27 N. H. 348.

In *Ames v. Winsor*, 19 Pick. 247, the writ described the defendant as of Duxbury, but then commorant in Boston. Held, that a return of a summons left at his last and usual place of abode in Boston, was invalid. Also, *Sanborn v. Stickney*, 69 Me. 343.

In *Gadsden ads. Johnson*, 1 Nott & McCord 89, the defendant had a town and country residence, and left the former with his family in November, and resided in the country until the following May. A writ left at his town house in April, was held to be no service. See, further, *Cunningham v. Maund*, 2 Ga. 171; *Greene v. Greene*, 11 Pick. 410; *Gilman v. Gilman*, 52 Me. 165; *Hairston v. Hairston*, 27 Miss. 704; *Walker v. Walker*, 1 Mo. App. 404; *Douglas v. New York*, 2 Duer 110; *Bartlett v. New York*, 5 Sandf. 44.

Whether leaving the copy of the writ at the place where defendant lodges, is sufficient, see *Bickford v. Skewes*, 9 Sim. 428; *Davies v. Westmacott*, 7 C. B. (N. S.) 829; *Anon.*, 4 Irish Law Rec. (O. S.) 180; *Fitzgerald v. Salentine*, 10 Metc. 436; *People v. Croft*, 7 Paige 325; *Hodson v. Gamble*, 3 Dowl. P. C. 174; *Smith v. Parke*, 2 Paige 298.

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the house in Caldwell soon after it was left there. The character of the defendant's residence there is shown by his answer to the question whether he did not make his home at the house in Caldwell when he went there with his family. His reply was, that if a man can have two homes, he did. The service on him there was a good service. It was at his dwelling-house or usual place of abode. *City Bank v. Merrit*, 1 Gr. 131; *Stout v. Leonard*, 8 Vr. 492. Moreover, it appears that the defendant has, since the service, taken a step in the litigation of the cause on the merits. He has given notice of taking testimony *de bene esse*. The motion is denied, with costs.

It seems not, after he has left such lodgings above twelve months, *Parker v. Blackbourne*, 2 Vern. 362; *Wotton v. Parsons*, 4 McCord 368; *Hyslock v. Hoppock*, 5 Ben. 447; *Barrett v. Black*, 25 Ga. 151.

The length of time a person remains at one or more houses does not affect or qualify his residence there, *Walcot v. Botfield*, Kay 534.

A hotel or boarding-house where defendant is temporarily sojourning, is not to be deemed "his usual place of abode," *White v. Primm*, 36 Ill. 416; *Smith v. Cohea*, 3 How. (Miss.) 35. See *Conwell v. Atwood*, 2 Ind. 289; *Segoine v. Auditor*, 4 Munf. 398.

An officer of a corporation who lives in another town, is not, as to corporation litigation, considered as having his residence where the corporation office is located, *Adams v. Willimantic Linen Co.*, 46 Conn. 320.

Service on a corporation may be made by leaving a copy of the writ at the official's dwelling, *Water Lot Co. v. Bank of Brunswick*, 30 Ga. 685; *Harris v. Somerset R. R. Co.*, 47 Me. 298. See *Holmes v. Fox*, 19 Me. 107; *Southern Co. v. Roger*, *Cheres Eq.* 48; *Hoen v. Atlantic R. R. Co.*, 64 Mo. 561; *Glaize v. South Carolina R. R.*, 1 Strobb. 70.

A corporation having more than one main office may be served at any of them, *Carbon Iron Co. v. McClaren*, 5 H. L. C. 416; *Pond v. Hudson River R. R.*, 17 How. Pr. 543; but not at a mere branch office, *Conroe v. National Protection Ins. Co.*, 10 How. Pr. 403.

Whether a strict and literal compliance with the statutory requirements as to leaving a copy must be shown by the return, *Vandirer v. Roberts*, 4 W. Va. 493; *Capehart v. Cunningham*, 12 W. Va. 750; *Tompkins v. Wiltberger*, 56 Ill. 385; *Pollard v. Wegener*, 13 Wis. 569; *Walke v. Bank of Circleville*, 15 Ohio 288; *Bruce v. Cloutman*, 45 N. H. 37; *Bryant v. State*, 5 Ind. 245; *Smithson v. Briggs*, 33 Gratt. 180. See *Palmer v. Keleher*, 111 Mass. 320; *Hyslop v. Hoppock*, 5 Ben. 447; *Pigott v. Snell*, 59 Ill. 106; *Earl v. McVeigh*, 91 U. S. 503.—REP.

Cornell v. Andrews.

PETER C. CORNELL et al.

v.

JOHN E. ANDREWS.

Title to lands in this state was derived through a mortgage given to "Joseph D. Beers, president of the North American Trust and Banking Company, his successors and assigns," without words of inheritance. The bill states that the North American Trust and Banking Company was a corporation of the state of New York, and its president, by virtue of the statutes of New York, a corporation sole of that state, and therefore took an estate in fee in said lands, under the mortgage.—*Held*, that the court would not, on an application for a specific performance of a contract to buy such lands, compel the vendee to complete his purchase, because such title was questionable, and therefore not marketable.

Bill for specific performance. On final hearing on bill and answer.

Mr. R. Gilchrist, for complainants.

Mr. C. H. Hartshorne, for defendant.

THE CHANCELLOR.

This suit is brought to enforce specific performance of a con-

NOTE.—The following cases show what defects in title a court considers doubtful or unmarketable :

That a use had not been executed, *Shapland v. Smith*, 1 Bro. C. C. 75; [this case was disapproved in *Vancouver v. Bliss*, 11 Ves. 465; *Stapylton v. Scott*, 16 Ves. 274.]

That a devise included a lease for lives, *Sheffield v. Mulgrave*, 2 Ves. 526.

That the premises had been inaccurately described, and their use limited to certain purposes, *Bentley v. Craven*, 17 Beav. 204; *Brookes v. Drysdale*, L. R. (3 C. P. Div.) 52; *Corless v. Sparling*, L. R. (9 Irish Eq.) 595; *Wardell v. Trenouth*, 24 Grant's Ch. 465; *Foley v. McKeown*, 4 Leigh 627.

That a devisee in trust of a survivor of several trustees, could exercise a power of sale given to all, and the survivor, his heirs, &c., *Macdonald v. Walker*, 14 Beav. 556; *Wilson v. Bennett*, 16 Jur. 966, 5 De G. & Sm. 475; *Cooke v. Crawford*, 13 Sim. 91; *Hamilton v. Buckmaster*, L. R. (3 Eq.) 323;

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tract for the sale of land in Hudson county. The price agreed to be paid is \$65,000. The defendant, resists on the ground that the title is not such as he ought to be compelled to take; that it is at least a doubtful one. The complainants insist, on the other hand, that their title is good, and free from all reasonable doubt. The objection made to the title is that it is derived under a mortgage given to "Joseph D. Beers, president of the North American Trust and Banking Company," which contained no words of inheritance, but conveyed the property to him, his successors and assigns. The defendant therefore apprehends, and

Titley v. Wootenholme, 7 Beav. 425; *Ashton v. Wood*, 3 Sm. & Giff. 435; *Sterens v. Austen*, 3 E. & E. 685; *Osborne v. Rowlett*, L. R. (13 Ch. Div.) 774.

That a deed not delivered, but retained by the vendor until payment of the purchase-money, was an escrow, *Sloper v. Fish*, 2 V. & B. 146. See *Hull v. Noble*, 40 Me. 459; *Stark v. Wilder*, 36 Vt. 752.

That a recovery may be suffered by a tenant in tail of lands, the reversion of which had vested in the crown by the attainder of the reversioner, *Blosse v. Clanmorris*, 3 Bligh 62.

That a covenant ran with the land, *Bristow v. Wood*, 1 Coll. C. C. 480; *Smith v. Kelley*, 56 Me. 64; *Lydick v. Baltimore and Ohio R. R.*, 17 W. Va. 427. ✓

That a presumption arises from non-payment of tithes, *Rose v. Calland*, 5 Ves. 186.

That a devise of an undivided moiety and of all of testator's other interest, &c., in the premises, authorizes a sale of the whole tract, *Stapylton v. Scott*, 16 Ves. 272.

That trustees took a fee or only a fee determinable on the payment of debts and legacies and the death of a legatee, *Collier v. McBean*, L. R. (1 Ch. App.) 81. See *Laurens v. Lucas*, 6 Rich. Eq. 217.

That the vendor's grantor was a lunatic, his deed being dated February 14th, 1854, and that a commission of lunacy issued in December, 1854, found that he was and had been insane from the month of February or March, 1854, *Francis v. St. Germain*, 6 Grant's Ch. 636; *Hinchman v. Ballard*, 7 W. Va. 152. See *Frost v. Beavan*, 17 Jur. 369; *Elliott v. Ince*, 3 Jur. (N. S.) 597.

That the premises are subject to an easement, *Krousbien v. Gage*, 10 Grant's Ch. 572; *Boulton v. Bethune*, 21 Id. 110, 478; *James v. Freeland*, 5 Id. 302; *Wardell v. Trenouth*, 24 Id. 465; *Hymers v. Branch*, 6 Mo. App. 511. ✓

That the terms of the instrument authorizing the sale have not been pursued, *Cooper v. Denne*, 1 Ven. 565; *Wrigley v. Sikes*, 21 Beav. 337; *Collard v. Sampson*, 16 Beav. 543, 4 De G., M. & G. 224; *Alexander v. Mills*, L. R. (6 Ch. App.) 124; *Rede v. Oakes*, 32 Beav. 555, 4 De G., J. & S. 505; *Cooper's Case*, L. R. (4 Ch. Div.) 802.

That a prior conveyance amounted to an act of bankruptcy, *Lewis v. Lush*, 24 Ves. 547. ✓

Cornell v. Andrews.

is advised that the estate mortgaged was but a life estate. The bill states that the North American Trust and Banking Company was, when the mortgage was given, a corporation of the state of New York, duly created by virtue of and pursuant to a statute of that state passed April 18th, 1838, and entitled, "an act to authorize the business of banking," and that Beers was then its president, and that by virtue of the twenty-fourth section of that act, he, as president, was a corporation sole of the state of New York, and therefore took an estate in fee under the mortgage, notwithstanding the absence of words of inheritance.

That doubts existed whether limitations after an estate for life were contingent remainders or executory devises, *Roake v. Kidd*, 5 Ves. 647.

That an ordinary devise passed estates of which the testator had been trustee, *Marlow v. Smith* 2 P. Wms. 198.

That it was questionable whether a trust was executed or executory, *Jervoise v. Northumberland*, 1 J. & W. 559.

That an assignment of a term to a mortgagee was protection against a judgment prior to the mortgage, *Freer v. Hesse*, 4 De G., M. & G. 495.

That a devise "of all my estates," to the use of three daughters, to be divided in equal shares, and in case of either of them dying, to the children of the decedent, but if no children then to the surviving daughters forever, gives a fee, *Rogers v. Waterhouse*, 4 Drew. 329. See *Vreeland v. Blauvelt*, 8 C. E. Gr. 483.

That a condition of sale, on a sale by a mortgagee under a power entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition of the vendee as to the title or otherwise, is so far depreciatory as to prevent performance, *Falkner v. Equitable Society*, 4 Drew. 352; *Cordingley v. Cheeseborough*, 4 De G., F. & J. 379; *Jones v. Clifford*, L. R. (3 Ch. Div.) 779.

That commissioners authorized by statute to exchange lands of one kind of tenure, can exchange for lands of another, *Minet v. Leman*, 1 Jur. (N. S.) 410; *Cattell v. Conall*, 4 You. & Coll. 228.

That certain phrases in a will constituted an estate tail, upon which the vendor, by suffering a recovery, could pass the fee, *Willcox v. Bellaers*, Turn. & R. 491.

That an executrix having power to mortgage lands for her maintenance, can sell them, *Cook v. Dawson*, 3 De G., F. & J. 127, 29 Bear. 123.

That a presumption arises from mere lapse of time, *Emery v. Grocock*, 6 Madd. 54; *Barnwall v. Harris*, 1 Taunt. 430; *Canston v. Macklew*, 2 Sim. 242; *Martin v. Cotter*, 3 Jon. & La Touche 496; *Magenius v. Fallon*, 2 Moll. 566; *Bolton v. School Board*, L. R. (7 Ch. Div.) 766; *Dutch Church v. Mott*, 7 Paige 77; *Hillary v. Waller*, 12 Ves. 239 [denied in *Byrne v. Frere*, 2 Moll.

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On the hearing, it was further urged that if Beers should not be held to be such corporation sole, it should be held that the words "Joseph D. Beers, president of the North American Trust and Banking Company," were one of the names of the corporation; and that, in either case, the title in fee passed by the mortgage. In support of these propositions are adduced adjudications of the courts of New York that associations under that act were corporations in fact, and that conveyances to the president were conveyances to the corporation, and also *dicta* of more or less weight, to the effect that those corporations were bi-

177; *State v. Franklin Falls Co.*, 49 N. H. 255]; *Thompson v. Millikin*, 9 Grant's Ch. 359; *Jones v. Fulghum*, 3 Tenn. Ch. 193; *Belmont v. O'Brien*, 12 N. Y. 394.

That mere possession for a long time is sufficient, *Sedgwick v. Hargrave*, 2 Ves. Sr. 59; *Prosser v. Watts*, 6 Madd. 59; *Eyton v. Dicken*, 4 Price 303; *Lewis v. Herndon*, 3 Litt. 350; *Chapman v. Lee*, 55 Ala. 616; *Seymour v. De Lancey*, Hopk. 436; *Hartley v. James*, 50 N. Y. 38; *McLaren v. Irvin*, 63 Ga. 275; *Shober v. Dutton*, 6 Phila. 185; *Crooks v. Glenn*, 8 Grant's Ch. 239; *Dewitt v. Thomas*, 10 Grant's Ch. 21; *Tillotson v. Gesner*, 6 Stew. Eq. 323; *Beckwith v. Kouns*, 6 B. Mon. 222; *Hightower v. Smith*, 5 J. J. Marsh. 542; *Cunningham v. Sharp*, 11 Humph. 116; *Scott v. Simpson*, 11 Heisk. 310.

That a devise of all of testator's real estate includes an advowson purchased by testator after executing his will, *Weddall v. Niron*, 17 Bear. 160. See *Lloyd v. E. & N. A. R. R.*, 2 Pug. & B. (N. B.) 194; *Hamilton v. Buckmaster*, L. R. (3 Eq.) 323.

That an underlease is sufficiently described as a lease, *Darlington v. Hamilton*, Kay 550; *Madeley v. Booth*, 2 De G. & Sm. 718; *Hayford v. Criddle*, 22 Beuv. 477; *Camberwell v. Holloway*, L. R. (13 Ch. Div.) 754; *Flood v. Pritchard*, 8 Rep. 512.

That an encumbrance remains uncanceled on the record, *Young v. Collier*, 4 Stew. Eq. 444; *Jones v. Fulghum*, 3 Tenn. Ch. 193; *Allen v. Atkinson*, 25 Mich. 351; *Tharin v. Fickling*, 2 Rich. 361; *Kenny v. Hoffman*, 31 Gratt. 442; *Guns v. Renshaw*, 2 Pa. St. 34; *Spohn v. Ryckman*, 7 Grant's Ch. 388; *Welsh v. Barton*, 24 Ohio St. 28; *Colwell v. Hamilton*, 10 Watts 413; *Nicol v. Carr*, 35 Pa. St. 381.

That a sale of lands under a partition between three tenants in common in fee and two tenants for life, with remainder to their children, had been made, *Young v. Rathbone*, 1 C. E. Gr. 224. See *Maxwell v. Goetschius*, 11 Vr. 383; *Bumberger v. Clippinger*, 5 Watts & S. 311.

That a written agreement existed to transfer lands bought in at sheriff's sale for the benefit of the vendor, *Dobbs v. Norcross*, 9 C. E. Gr. 327.

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nominous, one of their names being the one assumed, and the other that of the president (or other officer designated to hold and convey its land), as such. By the provisions of that act, mortgages or other conveyances of real estate to the association were not to be made to it, but to the president, or such other officer as should be indicated for the purpose in the articles of association; and it was further provided that the president, or such other officer and his successors, from time to time, might sell, assign and convey the same, free from any claim thereon against any of the shareholders or any person claiming under

That there were doubts whether lands were conveyed for the use of a particular church (the vendor), or for all the churches in the same town, *St. Mary's Church v. Stockton*, 4 Hal. Ch. 520.

That the lands agreed to be sold were not within a testamentary power of sale, *Chambers v. Tulane*, 1 Stock. 146.

That a power of sale was a personal trust in the executor, and could not be exercised by his executor, *Chambers v. Tulane*, 1 Stock. 146; *Dominick v. Michael*, 4 Sandf. 374.

That a *lis pendens* was filed after part of the consideration had been paid and possession taken by the vendee, *Earl v. Campbell*, 14 How. Pr. 330; *Pratt v. Bull*, 4 Giff. 117, 1 De G., J. & Sm. 141; *Bull v. Hutchens*, 32 Beav. 615.

That the boundary lines are in dispute, *Voorhees v. De Myer*, 3 Sandf. Ch. 614. See *Walsh v. Hall*, 66 N. C. 233; *Tamplin v. James*, L. R. (15 Ch. Div.) 215; *Bruck v. Tucker*, 42 Cal. 346.

That one of the deeds in the chain of title is not genuine, *Seymour v. De Lancey*, *Hopk.* 436; 5 Cow. 714.

That there is a failure of title as to an undivided portion of the lands, *Bates v. Delavan*, 5 Paige 299; *Arnold v. Arnold*, L. R. (14 Ch. Div.) 270; *Ashton v. Wood*, 3 Sm. & Giff. 436; *Evans v. Kingsberry*, 2 Rand. 120; *Bailey v. James*, 11 Gratt. 468; *Hendricks v. Gillespie*, 25 Gratt. 181; *Curran v. Little*, 8 Grant's Ch. 250; *Luckett v. Williamson*, 31 Mo. 54; *Buchanan v. Alwell*, 8 Humph. 516; *Terrell v. Farrar*, Walk. (Miss.) 417; *Love v. Camp*, 6 Ired. Eq. 209; *Swepton v. Johnston*, 84 N. C. 449; *Bader v. Neal*, 13 W. Va. 373; *Goddin v. Vaughn*, 14 Gratt. 102; or, of one of several lots purchased together, *Mott v. Mott*, 68 N. Y. 246. See *Osborne v. Bremar*, 1 Desauss. 486.

That there was a mistake in the description of the lands contained in a former conveyance, *Smith v. Turner*, 50 Ind. 367.

That a suit against the vendor as a surety on an official bond, had been begun after part payment of the purchase-money and possession by the vendee, *Snyder v. Spaulding*, 57 Ill. 480. See *Secrest v. McKenna*, 1 Strobb. Eq. 356.

That a lien for military services was prior in time to a title by pre-emption, *Kelly v. Bradford*, 3 Bibb 320. See *Palmer v. Locke*, L. R. (18 Ch. Div.) 381.

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them. It is insisted, on behalf of the complainants, that it is incumbent on this court to pass upon and decide, for the purposes of this litigation, the question raised in defence—whether the mortgage, which is the foundation of the title, conveyed an estate in fee or only for life. If such decision would have the force and effect of an adjudication in a direct proceeding for the purpose, and be an end of controversy on the subject, and establish the title, the court might well proceed to the determination of the question; but this suit is a proceeding *in personam* merely, and will bind those only who are parties to it. “It is a

That there were two rival claimants to the lands by pre-emption, *Young v. Lillard*, 1 A. K. Marsh. 481.

That there had been possession of lands for twenty-seven years, under a paper-writing acknowledging that one tenant in common had sold his interest to another, *Owings v. Baldwin*, 8 Gill 337.

That a guardian had sold the lands, and his deed was not executed or delivered until after the time limited in the order of sale, *Richmond v. Gray*, 3 Allen 25.

That the heirs of an owner of the equity of redemption of lands, who took an assignment of the mortgage to himself as trustee, had not shown a discharge thereof, *Sturtevant v. Jaques*, 14 Allen 523.

That there are doubts whether a proviso in a deed creates a condition or a restriction, *Jeffries v. Jeffries*, 117 Mass. 184. See *Whitlock's Case*, 32 Barb. 48; *Post v. Weil*, 8 Hun 418.

That the vendor's title was under a sheriff's sale against one who had sold the lands two years before such sheriff's sale, but his vendee's deed was not recorded until after the sheriff's, *Speakman v. Forepaugh*, 44 Pa. St. 363. ✓

That there was a defect in one of several leases included in the contract, *Freely v. Burnhart*, 51 Pa. St. 279. See *Camberwell Society v. Holloway*, L. R. (13 Ch. Div.) 754.

That lands of a wife had been sold under a judgment confessed by the husband and wife, *Swayne v. Lyon*, 67 Pa. St. 436.

That lands of an infant had been sold under a partition, in which no guardian was appointed for such infant, *Swain v. Fidelity Trust Co.*, 54 Pa. St. 455; *Vail v. Nelson*, 4 Rand. 478.

That lands sold to a vendee had been afterwards sold under execution on a prior judgment by confession by the vendor, waiving an inquisition, *Kostenbader v. Spotts*, 80 Pa. St. 430. See *Massey v. McIlwain*, 2 Hill's Ch. 421.

That a building restriction was not removed by a subsequent judicial sale for taxes, *Lesley v. Morris*, 9 Phila. 110. See *Boyd v. Schlesinger*, 59 N. Y. 301.

That a deed executed in trust to the vendor for the purpose of satisfying his vendor's creditors, did not specify which creditors, *Butler v. O'Hear*, 1 Desauss. 382.

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great, though perhaps a common mistake," said the court, in *Pratt v. Eby*, 67 Pa. St. 396, "to suppose that a doubtful title can be made marketable by an opinion of a court in a case stated between vendor and vendee." The real question to be decided in this case is whether the title which the complainant offers is a marketable one. If it is such a title as would be questionable, the court ought not to force it on the unwilling purchaser, even though, in its opinion, it would, on litigation, be sustained. Obviously, for the considerations before presented, the decision of the question in this suit would be

That six co-heirs informally partitioned their ancestor's estate, one plantation falling to C.; that no conveyances were made, and afterwards W., one of the co-heirs, died, leaving an infant heir, *Thompson v. Dulles*, 5 Rich. Eq. 270.

That a lien was insignificant and stale, *Belmont v. O'Brien*, 12 N. Y. 394. See *Kimball v. Took*, 64 Ill. 380, 70 Ill. 553; *Richards v. Mercer*, 1 Leigh 125.

That the vendor cannot give a good title until a pending suit is determined in his favor, *Parsons v. Gilbert*, 45 Iowa 33; *Johnston v. Jarrett*, 14 W. Va. 230.

That one of vendor's former title deeds has the grantor's name in the body of the deed "Edward," and is acknowledged as "Edward," but signed "Edmund," *Middleton v. Findla*, 25 Cal. 76.

That a judgment against a former owner, although satisfied, still remains on the record, and that a third person is in possession of part of the premises, although only a squatter, *Hoyt v. Tuxbury*, 70 Ill. 331. See *McHugh v. Wells*, 39 Mich. 175; *Blakemore v. Kimmons*, 8 Baxt. 470; *King v. Knapp*, 59 N. Y. 462.

That the title is derived through a defective chancery proceeding against unknown heirs, *Tevis v. Richardson*, 7 Mon. 654.

That an amendment to vendor's bill had been proposed to prove that a deed had been acknowledged and recorded properly, although not so appearing on its face, *Bartlett v. Blanton*, 4 J. J. Marsh. 426.

That a statement in a deed that certain persons conveying lands by order of a court are the heirs of one who died seized, did not also state that they are the *only* heirs, *Barnett v. Higgins*, 4 Dana 565.

That lands taken by municipal authority for a park, and paid for by bonds issued therefor, which are declared by statute to be a lien on such lands, can be sold in fee, free from that lien, because such lands were not afterwards included within the park, *Brooklyn Park v. Armstrong*, 45 N. Y. 234.

That the certificate annexed to one of the title deeds fails to set out that the official taking the acknowledgment was personally acquainted with the grantor, *Mullins v. Aiken*, 2 Heisk. 535; *Fryer v. Rockefeller*, 63 N. Y. 268. See *Brown v. Witter*, 10 Ohio 142; *Ludlow v. O'Neil*, 29 Ohio St. 181.

That a devise of the premises was to W. for life, then to W.'s sons for their

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but the opinion of this court on the subject, which would still be open to litigation by parties claiming adversely to the title. It is conceded that on its face, and in the absence of the construction contended for by the complainants, the mortgage, for the want of words of inheritance, conveyed only a life estate. The answer admits that the North American Trust and Banking Company was a corporation under the before-mentioned statute, and that Beers was its president, but it denies that a greater estate than a life estate passed by the mortgage. The title to real estate can only be acquired, passed and lost according to the

lives, remainder to their children in fee. W. survived the testator, and at his death the lands devised were divided among his sons, J., the vendor, being one, *Lowry v. Muldrow*, 8 Rich. Eq. 241. See *Miller v. Macomb*, 26 Wend. 229; *Williamson v. Field*, 2 Sandf. Ch. 533; *Kelso v. Lorillard*, 85 N. Y. 177.

That infant's land sold under a decree was bought by the infant's next friend, who sold it, and through a subsequent purchaser complainant became the owner, *Collins v. Smith*, 1 Head 251.

That lands were sold for partition without notice to the heirs, *Littlefield v. Tinsley*, 26 Tex. 353; *Martin v. Porter*, 4 Heisk. 407; *Shields v. Allen*, 77 N. C. 375.

That a deed for one-sixth of the premises cannot be found, *Griffin v. Cunningham*, 19 Gratt. 571. See *Thompson v. Millikin*, 9 Grant's Ch. 359.

That a tenant by the curtesy sold the fee, and the sale had been confirmed by court as to remaindermen, *Linkous v. Cooper*, 2 W. Va. 67. See *Bage v. Millard*, 12 N. Y. Leg. Obs. 57; *Oliver v. Dix*, 1 Dev. & Bat. Eq. 158; *Cody v. Gale*, 5 W. Va. 547.

That a devise was to a daughter for her sole and separate use, notwithstanding any future coverture, with a power of testamentary disposition, and she married, and with her husband conveys the fee, *Starnes v. Allison*, 2 Head 221.

That the sale was by a tenant for life and a contingent remainderman, *Sohier v. Williams*, 1 Curtis C. C. 479. See *De Saussure v. Bollman*, 7 Rich. (N. S.) 329.

That lands had been sold by a sheriff and a deed delivered therefor, although such sale was defective, *Morgan v. Morgan*, 2 Wheat. 290.

That the lands out of which the ground rent sold issued, had been encumbered by taxes, *Mitchell v. Steinmetz* (Pa.), 24 Alb. L. J. 197.

That one who had been seized and had never legally conveyed the premises, had estopped himself to claim title by encouraging the vendee to purchase the premises, *Mullins v. Aiken*, 2 Heisk. 535.

That an inchoate right of dower of one of the vendor's predecessors in title had not been released, except by the vendor's statement as a witness, *Coray v. Mathewson*, 7 Lans. 80.

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lex rei sitæ, and a party must have a capacity to take according to the law of the *situs*, otherwise he will be excluded from all ownership. *Story's Confl. of L.* §§ 428, 430. The question whether the mortgage was in fact given to a corporation, whether aggregate or sole, or to a natural person, is one to be determined by our courts, and until it shall have been so decided in a direct proceeding, the title will be subject to an objection materially affecting its marketable value. The exercise of equity jurisprudence respecting the specific performance of contracts is not a matter of right in either party, but of sound and reasonable dis-

That a prior deed contains a power in trust that may be exercised, *Ford v. Belmont*, 7 Rob. (N. Y.) 97, 508.

That a person having an interest in the premises has been absent and not heard from for more than seven years, *McDermot v. McDermot*, 3 Abb. Pr. (N. S.) 451.

That a defect in a lease agreed to be assigned cannot be cured by the assignee procuring the reversion, *Bensel v. Gray*, 12 Jones & Spen. (N. Y.) 372; 62 N. Y. 632, 80 N. Y. 517. See *Mayer v. Adrian*, 77 N. C. 83.

That the premises had been sold for taxes assessed pending a litigation between the vendor and vendee over the premises, *Wilson v. Tappan*, 6 Ohio 120.

That executors had a questionable power of sale, and that one of them had refused to join in the deed, *Finley v. Burgoyne*, Dud. (S. C.) Eq. 133.

That a deed of trust had been executed to the sole use of M. for life, with a power of testamentary disposition, and in default thereof in trust for M.'s next of kin, with power in the trustee to sell and re-invest, subject to the same trusts. The trustee sold and re-invested in lands, the deed for which expressed no trusts. M. sold the lands in fee, and the trustee released all his interest in the premises, *Monaghan v. Small*, 6 Rich. (N. S.) 177.

That the premises were liable for an uncertain amount of dues to a building association, which could not be ascertained without a suit in equity and an account, *Christian v. Cabell*, 22 Gratt. 82.

That a testator's will contains a devise of the premises, "after my just debts are paid," *Garnett v. Macon*, 2 Brock. 185.

The case of *Pyrke v. Waddingham*, 10 Hare 1, was approved in *Mullings v. Trinder*, L. R. (10 Eq.) 449, so far as the principles there laid down extend, but, under precisely the same facts, a specific performance was decreed. It was also limited in *Bull v. Hutchens*, 32 Beav. 619.

If necessary, the court may inquire into matters of fact, *Smith v. Death*, 5 Madd. 370; *Lyddal v. Weston*, 2 Atk. 19; *Braybroke v. Inskip*, 8 Ves. 417; *Burroughs' Case*, L. R. (5 Ch. Div.) 601; *Lowes v. Lush*, 14 Ves. 547; *Spencer v. Topham*, 22 Beav. 573; *Hayes v. Harmony Grove*, 108 Mass. 400; *Seymour*

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cretion in the court. *Story's Eq. Jur.* § 742. And the court, in the exercise of that discretion, will not compel a party to take a title which may expose him to litigation, even though it may believe the title to be good. *Pyrke v. Waddington*, 10 Hare 1; *Dobbs v. Norcross*, 9 C. E. Gr. 327; *Fry on Spec. Perf.* § 573; *Waterman on Spec. Perf.* § 412, and cases cited. Said the court, in *Tillotson v. Gesner*, 6 Stew. Eq. 313:

“The true rule is stated in 3 *Pars. on Con.* (6th ed.) *380, that if the character of the title be doubtful, although the court were able to come to the conclusion that on the whole a title

v. De Lancey, Hopk. 436; *Schermerhorn v. Niblo*, 2 Bosw. 161; *Winne v. Reynolds*, 6 Paige 407; *Miller v. Macomb*, 26 Wend. 229; *Murray v. Harway*, 56 N. Y. 337.

Specific performance has been refused even after an issue on the very title had been sent to the King's Bench and decided, *Sheffield v. Mulgrave*, 2 Ves. 526; *Morrison v. Barrow*, 1 De G., F. & J. 633. See *Rushton v. Craven*, 12 Price 599; *Rose v. Calland*, 5 Ves. 186; *Seymour v. De Lancey*, Hopk. 436, 5 Cow. 714; *Stevens v. Austen*, 3 E. & E. 685; *Jeakes v. White*, 6 Erch. 873; *Simmons v. Heseltine*, 5 C. B. (N. S.) 554.

The late English rule seems to be that the court of appeal, in a case before it, will decide on the validity of the vendor's title, and, irrespective of the decree below, direct a conveyance or not accordingly. *Beioley v. Carter*, L. R. (4 Ch. App.) 230; *Sheppard v. Doolan*, 3 Dr. & War. 1; *Bell v. Holtby*, L. R. (15 Eq.) 178; *Bull v. Hutchens*, 32 Beav. 619; *Radford v. Willis*, L. R. (7 Ch. App.) 7; *Alexander v. Mills*, L. R. (6 Ch. App.) 124; *Wrigley v. Sikes*, 21 Beav. 348; *Cook v. Dawson*, 3 De G., F. & J. 127. See, further, *Osborne v. Rowlett*, L. R. (13 Ch. Div.) 774; *Palmer v. Locke*, L. R. (18 Ch. Div.) 388; *Sedgwick v. Hargrave*, 2 Ves. Sr. 59; *Parkin v. Thorold*, 16 Beav. 67; also *Goss v. Singleton*, 2 Head 67; *McClure v. Harris*, 7 Heisk. 379; *Smith v. Estes*, 72 Mo. 310; *Dominick v. Michael*, 4 Sandf. 374; *O'Reilly v. King*, 2 Rob. (N. Y.) 587; *Kelso v. Lorillard*, 85 N. Y. 177; *Ludlow v. O'Neil*, 29 Ohio St. 181; *Jackson v. Ligon*, 3 Leigh 161.

Where the lands are in this state, although the defendant is a non-resident, specific performance may be decreed, *Telfair v. Telfair*, 2 Desauss. 271; *Matteson v. Scofield*, 27 Wis. 671.

The validity of a mortgage on lands is to be determined by the *lex rei sitæ*, although both of the parties thereto may be non-residents, *Goddard v. Sawyer*, 9 Allen 78; *Hosford v. Nichols*, 1 Paige 220; *Lyon v. McIlvaine*, 24 Iowa 9; *Thayer v. Marsh*, 11 Hun 591. See 1 *Jones on Mort.* §§ 656-663.

Where a creditor resides or is found in this state, with deeds in his possession for lands in New York, deposited in that state (where such deposit constitutes an equitable mortgage), he will not be compelled to surrender

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could be made that would not probably be overthrown, this would not be good enough, for the court have no right to say that their conclusion or their opinion would bind the whole world, and prevent an assault on the title. The purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. The court cannot satisfactorily or conclusively

them until the debt is paid, *Griffin v. Griffin*, 3 C. E. Gr. 104; *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 303.

A mortgage to A, "his executors, administrators and assigns," conveys only a life estate, *Clearwater v. Rose*, 1 Blackf. 137.

A mortgage executed in New York, where the mortgagee resided, on lands in Massachusetts, to him, "his successors and assigns forever," conveys only a life estate, *Sedgwick v. Luflin*, 10 Allen 430.

A mortgage of lands in New Jersey, drawn in New York, to executors, "their successors and assigns," containing the usual clause, conveying all the mortgagor's estate, right, title and interest, and recorded in full, is notice to a subsequent encumbrancer that such mortgage was intended to convey the fee, *Bunker v. Anderson*, 5 Stew. Eq. 35.

Such a mortgage may be reformed, *Wilson v. King*, 12 C. E. Gr. 374. See *Wheeler v. Kirtland*, 8 C. E. Gr. 13, 9 C. E. Gr. 532; *Fish v. New York Co.*, 2 Stew. Eq. 16, 610; even against a third person who acquires rights with notice, *Gale v. Morris*, 2 Stew. Eq. 222, 3 Id. 285.

By the law of Ohio, a married woman over eighteen years old may contract. A mortgage on lands in Ohio, executed by a non-resident married woman over eighteen, but under twenty-one, was held good, although by the law of her domicil she was incapable of contracting, *Sell v. Miller*, 11 Ohio St. 331. See *Thompson v. Ketchum*, 8 Johns. 189.

A mortgage on lands in Kentucky, executed during the war by a citizen of Tennessee to a citizen of Kentucky, is void, *Hyatt v. James*, 2 Bush 463.

A mortgage on lands in Wisconsin was given to a bank in New York by its corporate name.—*Held*, good, although the statutes of New York provide that all conveyances of real estate should be made to the president. An assignment of such mortgage by "R. R. K, President of the Farmers' Bank of Saratoga County, New York," duly executed and acknowledged by him as president, with the corporate seal attached, was also held good, *Kennedy v. Knight*, 21 Wis. 340.

A court of the state of New York, where a mortgage on lands in Colorado was executed, giving a power of sale in New York in case of default, will not enjoin such sale after default, on a mere allegation that such power is void, no statute of Colorado being shown which prohibits such sale, *Central Gold Mining Co. v. Platt*, 3 Daly 263.—REP.

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settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the land.”

It is quite clear that if this court were to compel the defendant to take the title in question, it would have no judicial certainty that he would not be subject hereafter to litigation to test before other tribunals, in direct proceedings, the very question which it would have decided in this suit. Much less could it be certain that he would not be embarrassed in disposing of the property to purchasers by the apparent defect of estate which he now urges in his defence. Under such circumstances, a decree of specific performance should be denied.

SARAH C. PLIMLEY

v.

GEORGE P. PLIMLEY.

A separation sought by a wife because her husband is intemperate and improvident, is not an obstinate and willful desertion on his part, within the meaning of the divorce act.

Petition for divorce for desertion. On final hearing on pleadings and proofs.

Mr. Henry Puster, for petitioner.

Mr. R. B. Seymour, for defendant.

THE CHANCELLOR.

This is a suit for divorce from the bond of marriage, on the ground of desertion. The defendant answered, and by his counsel cross-examined the witnesses produced by the petitioner, but did no more in his defence. The proof does not sustain the

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charge. It is quite clear, from the petitioner's own testimony, that the separation was, if not of her own seeking, with her consent. She says that two months after her husband left her he came to see her, and asked her if she ever intended to live with him again, and that she answered, stating the conditions on which alone she would consent to do so. They were that he should totally abstain from intoxicating drink for six months, and prove to her that he had done so, and would save money enough to refurnish the house. Her sister says that he came to see his wife on several occasions after the alleged desertion, and that on none of them did his wife ask him to stay, and she adds that she (his wife) was only too glad to get rid of him. He was not intoxicated at all the times when he visited her. When one of their children died he came to the house, and was there for two days, and was sober then, and conducted himself with entire propriety. But it appears that the wife declined to converse with him on that occasion. The circumstances under which he left her are not stated by any witness, nor is there any evidence on that head. The petitioner, indeed, swears that he "deserted" her, but gives no circumstances. That is not sufficient to establish the character of the departure. *Leaning v. Leaning*, 10 C. E. Gr. 241. It is charged that he is intemperate and improvident, and he may have been so, and his wife may have refused to live with him for that reason; but those facts will not of themselves alone make a separation sought by the wife a desertion by the husband within the meaning of the divorce act. *Laing v. Laing*, 6 C. E. Gr. 248; *Palmer v. Palmer*, 7 C. E. Gr. 88; *Hankinson v. Hankinson*, 6 Stew. Eq. 66. There must be an abandonment without the consent and against the will of the abandoned party, and persisted in for the statutory period, or what is equivalent to such abandonment, as in the cases mentioned in *Palmer v. Palmer*. The evidence leads to the conclusion that the petitioner refused to live with her husband, and separated herself from him merely because of his alleged intemperance and improvidence. The petition will be dismissed.

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Johnson v. Johnson.

RACHEL JOHNSON

v.

THOMAS E. JOHNSON.

A husband was intemperate and idle, and his wife told him that if he was going to continue to do as he had done, they "might as well each do for themselves," whereupon he left her. They separated amicably; she attending him to the railroad station when he left. She swears that she has never seen or heard from him since then (in 1878), although he appears to have written two letters to their daughter, who lived with her mother, the first letter being written about a year after he went away. The wife says that, by her expression, she meant, "that either he must support his family, or she and he must each support himself or herself."—*Held*, that the separation does not amount to desertion to justify a divorce.

Petition for divorce.

Mr. R. P. Wortendyke, for petitioner.

THE CHANCELLOR.

This is a suit for divorce for desertion. The alleged desertion took place on the 28th day of January, 1878. The petitioner in her testimony says that she and her husband had had frequent conversations on the subject of his habits, which, she says, were intemperate and idle, and his not providing for the support of the family; that, on the night before his departure, she asked him what he was going to do, and said to him that if he was going to continue to do as he had done, they "might as well each do for themselves," and that he then said that "if that was the way she preferred, they could do so." She says that the next morning, the day on which he went away, he asked her if she meant what she said, and that she replied that she did, and was determined upon it. When he left she accompanied him to the railroad station, and they bade each other good-bye. He did not then take his clothes, but about two

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weeks afterwards sent his mother after them, and she got them. The petitioner states what she meant by the language she used to her husband which caused his departure. She says she meant that "either he must support his family or she and he must each support himself or herself." It appears from the testimony of the daughter of the parties, who lives with her mother, that he wrote to the daughter about a year after he went away. She replied to the letter and received another one afterwards, which she also answered. But it does not appear by the testimony where he then was. The petitioner says she has never seen or heard from him since he left her. She probably means that she has not heard from him directly, for it is to be presumed that she knew of his correspondence with the daughter. The separation of these parties appears to have been brought about by the petitioner herself, and so far from deserting his wife, the defendant left her only when she insisted that they must separate. As before stated, she accompanied him to the railroad station when he left, and they bade each other good-bye, and seem to have parted in friendship. What took place between them on the occasion of the separation appears only from her testimony, and it does not appear what were the contents of the letters written by him to his daughter. If, as the petitioner says, she intended that if he did not support his family he must leave her, and she therefore insisted on his going, his departure was not a desertion within the divorce act. *Laing v. Laing*, 6 C. E. Gr. 248; *Palmer v. Palmer*, 7 C. E. Gr. 88; *Hankinson v. Hankinson*, 6 Stew. Eq. 66. There must be an abandonment against the will of the abandoned party, persisted in for the period fixed by the statute, or the equivalent of such abandonment, as in the cases mentioned in *Palmer v. Palmer*. The conditions of the law are not fulfilled by the separation and conduct shown in this case. Moreover, all the proof on the subject of the desertion is the petitioner's own testimony, and it is not corroborated. The petition will be dismissed.

Pell v. Vreeland.

DAVID A. PELL, administrator,

v.

TUNIS W. VREELAND et al.

Where the complainant in a cause promised to notify the petitioner, who was interested in the property, of the time and place of sale, and forgot so to do, in consequence whereof the petitioner did not attend, and the property was sacrificed, such sale was set aside.

Bill to foreclose. Motion to set aside master's sale. On petition and depositions.

Mr. Debaun, for the motion.

Mr. M. Demarest, contra.

THE CHANCELLOR.

The property was twice advertised for sale under the execution in this cause. The petitioner, who was interested in the property, attended at the time and place fixed in the first advertisement. He was then and there told by the complainant that owing to a mistake in the advertisement the sale would not take place, but would be re-advertised. The complainant then promised to notify him of the sale. Through forgetfulness he did not do so, and the sale took place in the absence and without the knowledge of the petitioner, and the property was sold at an inadequate price. The petitioner relied on the complainant's promise. He intended to be present at the sale and buy the property. He estimates it as worth, at a low valuation, \$900. It was sold for \$160. The sale should be set aside, without costs. The costs of resale will be borne by the property. The money paid by the purchaser to the master, is of course to be repaid to him.

Hesketh v. Murphy.

MARY ANN HESKETH,

v.

JOHN MURPHY, executor and trustee.

A trust "to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund," with a power of appointing and substituting trustees for those named, is a valid charity, and will be executed.

Bill to set aside trust for charity.

Mr. D. C. Bolton and *Mr. W. B. Gourley*, for complainant.

Mr. H. A. Williams, for defendant.

THE CHANCELLOR.

William S. Malcolm, late of Paterson, died in 1872. His will contained the following provision :

"After the death of my said wife, I hereby empower and direct my said trustees or trustee for the time being of this my will, to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid

NOTE.—The following cases show instances of similar bequests to the poor which have been upheld as charities: To poor men decayed by misfortune or the visitation of God, *Skinner's Case*, *Moore* 129; for the marriage of poor virgins, *Porter's Case*, 1 Co. 26; for poor dissenting ministers living in any county, *Waller v. Childs*, *Amb.* 524; to place out apprentices and to be lent to decayed tradesmen, *Atty.-Gen. v. Coventry*, 2 Vern. 397, *Colles's P. C.* 280; to the poor inhabitants of S., *Atty.-Gen. v. Clarke*, *Amb.* 422; to the poor, *Atty.-Gen. v. Rance*, *Amb.* 422; *Atty.-Gen. v. Peacock*, *Finch* 245; for the poor inhabitants of S., in the county of H., and of B., in the county of H., *Hereford v. Adams*, 7 Ves. 324; for the relief of the poor of S., *Atty.-Gen. v. Wilkinson*, 1 Bear. 372; to church wardens to distribute amongst twelve poor people who

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forever, without regard to color or sex ; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund. And for the purpose of preserving and continuing a perpetual succession of trustees for the purpose of carrying into full effect the provisions of this my will, I do hereby empower my said trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or if none, then I direct and hereby empower the proving executors or executor for the time being, or the administrators or administrator for the time being, of the last surviving trustee, to substitute by any proper writing under his, her or

had lived in the parish for twelve years, "in honest fame and opinion," *Atty.-Gen. v. Bovill*, 1 *Phill.* 762; for the aid and relief of the poor citizens and inhabitants of E., "who are heavily burthened with the fee farm rents of that city, and other impositions and talliages," *Atty.-Gen. v. Exeter*, 2 *Russ.* 45, 3 *Russ.* 395; to the poor inhabitants of T. R., *Rogers v. Thomas*, 2 *Keen* 8; to the widows and orphans of L., *Atty.-Gen. v. Comber*, 2 *Sim. & Stu.* 93; to the widows and children of seamen belonging to the town of L., *Powell v. Atty.-Gen.*, 3 *Meriv.* 48; to such poor widows or creditable, industrious unmarried women, upwards of forty years of age, residing in U. and C., having no relief from those places, *Russell v. Kellett*, 3 *Sm. & Giff.* 264; to the overseers of the poor of S., to be applied to their use and benefit, in aid of the poor rate, *Preece v. Howells*, 2 *B. & Ad.* 744; for the relief of the widows and orphans of the clergy of W., *Kilvert's Trusts*, *L. R.* (12 *Eq.*) 183; (7 *Ch. App.*) 170; for the education of poor children at a school about to be erected near C., *Society v. Price*, 7 *Irish Eq.* 260; to the monks of S., to provide clothing for the poor children attending their schools, *Carbery v. Cox*, 3 *Irish Ch.* 231; for building a house for reduced gentlewomen, *Atty.-Gen. v. Power*, 1 *Ball & B.* 145; *Atty.-Gen. v. Tancred*, 1 *Eden* 10; for clothing such poor children as should be educated in the school of the nunnery of W., *Ibid.*; to the poor "on my little estate in S.," *Bristow v. Bristow*, 5 *Beav.* 289; among poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families, if of good character, *Nash v. Morley*, 5 *Beav.* 177; to be disposed of by A. B. and his executors at their discretion, among poor housekeepers, *Atty.-Gen. v. Pearce*, 2 *Atk.* 87; to faithful domestic servants settled in G., *Müller v. Rowan*, 5 *Cl. & Fin.* 99. See *Reeve v. Atty.-Gen.*, 3 *Hare* 191; *Loscombe v. Wintringham*, 13 *Beav.* 87; to widows or poor orphans of non-conformist ministers, not being at the time worth upwards of £100 a year, and widows being upwards of fifty years of age, *Atty.-Gen. v. Glegg*, 1 *Atk.* 356; to be yearly disposed of forever in relieving the distressed and poor about G., in meat, drink and clothing, at the discretion of the executor, forever, *Atty.-Gen. v. Johnson*, *Amb.* 190, note; "some donation out of my property to the poor of the different places where I have estates," *Price v. Canterbury*, 14 *Ves.* 363; in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, "as my said wife shall judge most worthy and deserving objects," *Waldo v. Coley*, 16 *Ves.* 206; see *Norris v. Thomson*, 4 *C. E. Gr.* 308, 5 *C. E. Gr.* 489; an annuity to three parishes of L., for the poor of the parishes,

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their hands or hand, any fit person or persons in whom alone, or, as the case may be, jointly, with the surviving or continuing trustees or trustee, my trust estate shall vest or proper assurance be vested."

The objection made to the gift is that it is too indefinite, especially seeing that, as it is contended, no power of selection of the objects is conferred. The gift is for the relief of the most deserving poor of the city of Paterson, without regard to color or

and the residue for the use of the poor in general forever, *Atty.-Gen. v. Matthews*, 2 *Lev.* 167. To trustees, in such way as they might judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of S. and W., *West v. Shuttleworth*, 2 *Myl. & K.* 684. See *Atty.-Gen. v. Marchant*, *L. R.* (3 *Eq.*) 424; to the vicar and church wardens of the parish of O., for the benefit of the poor of the parish of O. and the adjoining parishes, *Atty.-Gen. v. Brandreth*, 1 *You. & Coll. Ch.* 200. See *Edinburgh v. Aubrey*, *Amb.* 236; to pay and divide the residue at Christmas every year forever, amongst the aged poor of the parish, *Fisk v. Atty.-Gen.*, *L. R.* (4 *Eq.*) 521; for the employment and support of the poor of the parish of R., *Atty.-Gen. v. Blizzard*, 21 *Beav.* 233; to commissioners of emigration, for the benefit of poor persons emigrating to certain designated colonies, *Barclay v. Maskelyne*, 4 *Jur. (N. S.)* 1294; to forty decayed families that are come to poverty purely by losses unavoidable; to forty poor widows upwards of fifty years of age, and not worth £40; to forty poor maidens whose parents formerly lived well, and are come to decay: to twenty poor boys to clothe and put out to apprentice, *Atty.-Gen. v. Speed*, *West's Ch.* 491; to be divided equally, twice in the year, between twenty aged widows and spinsters of the parish of P., *Thompson v. Corby*, 27 *Beav.* 649; to purchase land, to be let out to the poor at a low rent, *Crafton v. Frith*, 15 *Jur.* 737. See *Atty.-Gen. v. Leigh*, 2 *Ves.* 389; *Atty.-Gen. v. Whitechurch*, 3 *Ves.* 141; *Atty.-Gen. v. Drapers' Co.*, 2 *Beav.* 508; *Reeve v. Atty.-Gen.*, 3 *Hare* 191; for the relief of the poor in W., *Wilkinson v. Malin*, 2 *Cr. & Jer.* 636; to be distributed every Sunday, after morning service, by the minister and church wardens of D. among so many poor of the parish as were most constant in attending divine service, *Ashton's Charity*, 27 *Beav.* 115; for the most poor and needy that be of good life and conversation, that should be inhabiting the parish of K., *Campden Charities*, *L. R.* (18 *Ch. Div.*) 310; for providing a proper school-house for the instructing of twenty poor girls of the parish of B. in needle-work, reading and writing, and also for clothing them, *Johnston v. Swann*, 3 *Madd.* 457; also, *Atty.-Gen. v. Williams*, 2 *Cox C. C.* 387; *Atty.-Gen. v. Lepine*, 2 *Swanst.* 181; to the incumbent of U. for providing wine and bread for the sick poor of U., *Birkett's Case*, *L. R.* (9 *Ch. Div.*) 576. See *Strauss v. Goldsmid*, 8 *Sim.* 614; *Atty.-Gen. v. Haberdasher's Co.*, 1 *Myl. & K.* 420; in supporting or founding free or ragged schools for gutter children, or for the poorest of the poor, *Morley v. Croxon*, *L. R.* (8 *Ch. Div.*) 156. See *School Board v. Falconer*, *Id.* 571;

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sex, to whom alone it is to be confined. A gift for the relief of the poor of a city generally, is undoubtedly a valid charity. *Shelf. on Mortmain* 62. And so, too, where the gift is confined to a certain class of poor persons, as to poor, pious persons (*Nash v. Morley*, 5 Beav. 177); or, to the widows and orphans (construed to mean poor widows and orphans) of a parish (*Atty.-Gen. v.*

to the incumbents of C. and S., to be divided equally amongst three poor sick or infirm people residing in their respective parishes, *Williams's Case*, L. R. (5 Ch. Div.) 735; the surplus to be given by testator's executors every year to poor pious members of the Methodist society of G. above the age of fifty years, *Dawson v. Small*, L. R. (18 Eq.) 114; £50 for the poor of T., *Kane v. Cosgrove*, L. R. (10 Irish Eq.) 211; for an almshouse for aged men and women; for schools for poor boys and poor girls, and that every poor boy and girl, when leaving the school, have a "Whole Duty of Man," or some other of the books of devotion named; to redeem poor persons out of prison, *Atty.-Gen. v. Bishop of Limerick*, L. R. (5 Irish Eq.) 403. See *Thrupp v. Collett*, 26 Beav. 125; *Atty.-Gen. v. Painter Co.*, 2 Cox C. C. 51; to set the poor on work, and otherwise for the relief of the poor, in such parishes and in such manner as the trustees named or their survivor should think fit, so as the parish of S., in the city of R., should be one of them, *Atty.-Gen. v. Ruller*, Jac. 407; to trustees to pay the interest and dividends to the poor inhabitants of the parish of L., in the county of M., forever, by half-yearly payments, *Atty.-Gen. v. Freeman*, Dan. 117, 5 Price 425. See *Atty.-Gen. v. Ward*, 3 Ves. 328; to V., his executors &c., desiring him to dispose of the same in such charities as he thought fit, recommending poor clergymen with large families and good characters, *Moggridge v. Thackwell*, 1 Ves. 464, 7 Ves. 36; bread to be distributed to poor persons attending divine service, and chanting testator's version of the Psalms [which could not be chanted, because not authorized], *Brantham v. East Burgold*, 2 Ves. 388; to give a quartern loaf of bread to twenty persons weekly, *Limbrey v. Gurr*, 6 Madd. 151; a moiety to be laid out in buying corn and firing, to be given to the poor of W. about Christmas or New Year's day, *Atty.-Gen. v. Wisbech*, 6 Jur. 655; to buy and distribute one hundred and thirty-eight quarters of coals, or money to buy coals at 8d. per quarter, amongst the poor, *Yordon's Charity*, 5 Sim. 571; for clothing and educating eight poor boys in E., *Latmyer's Charity*, L. R. (7 Eq.) 353; for the garments of twelve poor men and twelve poor women, at a specified price, *Merchant Taylors' Co. v. Atty.-Gen.*, L. R. (11 Eq.) 35. See *Atty.-Gen. v. Wax Chandlers' Co.*, L. R. (5 Ch. App.) 503; to keep a house in readiness for the reception of poor plague patients during their sickness, and for a burial place for such as are deceased, *Atty.-Gen. v. Earl of Craven*, 21 Beav. 392; to poor relations, or, in default of them, to poor persons in the county of A., *Campbell v. Earl of Radnor*, 1 Bro. C. C. 271; to necessitated decayed freemen of a designated company, their widows and children, not exceeding £10 a year to any family, *Ironmongers' Co. v. Atty.-Gen.*, 10 Cl. & Fin. 908; to and for the support,

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Comber, 2 Sim. & Stu. 93); and the deserving poor of a town. *Goodell v. Association, 2 Stew. Eq. 32*. "Where," says Lord Hardwicke, in *Atty.-Gen. v. Pearce, 2 Atk. 87*, "testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be

maintenance and education of the poor white citizens of Kent county generally, *State v. Griffith, 2 Del. Ch. 392, 421*; for the education of poor children belonging to the county, *Newson v. Starke, 46 Ga. 88* [overruling *Beall v. Drane, 25 Ga. 430*]; to the poor of Madison county. *Heuser v. Harris, 42 Ill. 425*; *Prickett v. People, 88 Ill. 115*; to the education of colored children in the state of Indiana, *Lindley's Case, 32 Ind. 367* [see *Grimes v. Hannon, 35 Ind. 198*]; to the county of O. in the state of Indiana, for colored children of said county, *Craig v. Secrist, 54 Ind. 419*; for the sole relief and benefit of poor widows over the age of fifty years, of irreproachable character, who have resided not under three years within eight miles of the town of W., and who have no certain income, *De Bruler v. Ferguson, 54 Ind. 549*; to the commissioners of L. county, for the use and benefit of the orphan poor, and for other destitute persons, of said county, *Comrs. v. Rogers, 55 Ind. 297*; for educating some poor orphans of this county, to be selected by the county court, * * * and to be confined to such as are not able to educate themselves, *Moore v. Moore, 4 Dana 354*; to the suffering poor of the town of A., *Howard v. Am. Peace Soc., 49 Me. 288*; for the comfort, relief and welfare of the poor and distressed within the city and neighborhood of P., *Deering v. Adams, 37 Me. 264*; to deserving relations and such indigent persons as they [the executors] may think worthy of the same, and in such manner as they may think proper, *Drew v. Wakefield, 54 Me. 291*; to the first committee of the school society in the town of R., for the use and benefit of such families in said society in their schooling, as shall not exceed, in the list of the town for the year, the sum of \$50, *Birkard v. Scott, 39 Conn. 63*; to purchase fuel, to be given or sold at low prices, as may be deemed best by the trustees, to such worthy and industrious persons as are not supported in whole or in part at the public expense, *Webb v. Neal, 5 Allen 575*; to provide and sustain a home for respectable, destitute, aged, native-born American men and women, *Odell v. Odell, 10 Allen 1*; to provide groceries for the sick and infirm, and clothing and fuel for the helpless and needy, *Washburn v. Sewall, 9 Metc. 280*; to be applied to the use of the poor of Old South Church, *Atty.-Gen. v. Old South Society, 13 Allen 474*; to pay over to such of the aged and infirm native-born inhabitants of K., and maiden ladies who are native-born inhabitants of K., *although they be not aged*, as shall be deemed, by the person appointed for that purpose by the town of K., most needy, and no part shall be paid to any person who is receiving support as a pauper, *Fellowes v. Miner, 119 Mass. 541*; to take, receive and distribute the same among the poor, meritorious widows living and belonging within the limits of the First Ecclesiastical Society

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private, yet in the extensiveness of the benefit accruing from them they may very properly be called public charities. A sum to be disposed of by A. B. and his executors, at their discretion, among poor housekeepers is of this kind." The general principle is that courts of chancery uphold and administer gifts where they are made to particular purposes which are charitable within

of the town of N., *Sohier v. Burr*, 127 Mass. 221; to furnish relief to all poor emigrants and travelers coming to S. on their way *bona fide* to settle in the West, *Chambers v. St. Louis*, 29 Mo. 543; to be divided between two townships, according to their population, for the purpose of educating their poor orphan children, and any surplus to the poor widows, *Mason v. Trustees*, 12 C. E. Gr. 47; to testator's brother, to be applied at discretion to alleviating the wants and sufferings of the deserving poor of M., *Goodell v. Union Assn.*, 2 Stew. Eq. 32; for the relief of such indigent persons residing in the township of F. as the trustee for the time being shall select, *Shotwell v. Mott*, 2 Sandf. Ch. 46 [see *Bascom v. Albertson*, 34 N. Y. 609]; to executors, to apply at their discretion \$50 a year to the relief of the poor of S. church, for a specified number of years, *McLoughlin v. McLoughlin*, 30 Barb. 458; for the education of the children of the poor, who shall be educated in the academy in the village of H., *Williams v. Williams*, 8 N. Y. 525 [see *Bascom v. Albertson*, 34 N. Y. 617]; for the establishment of a free school or schools for the benefit of the poor of D. county, *State v. McGowen*, 2 Ired. Eq. 9. See *Black v. Ligon*, Harp. Eq. 205; after the death of B. to the poor of the county of B., *State v. Gerard*, 2 Ired. Eq. 210; to the bishop of North Carolina, in trust for the poor orphans of the state, and the said bishop and his successors to have the right to select such orphans, *Miller v. Atkinson*, 63 N. C. 537. See *Jack v. Reilly*, 2 Hud. & Bro. 301; *Mullanphy v. Peterson*, 1 Mo. 758; a school for orphan children or the children of poor and indigent parents, "who, in the judgment of my trustees, are best entitled to the donation, and it is my wish to clothe and maintain the indigent scholars as well as school them," *Griffin v. Graham*, 1 Hawks 96; to establish a school in the town of Z. for the poor children in said town, *Zanesville Manf. Co. v. Zanesville*, 9 Ohio 203, 20 Ohio 483, 17 Ohio St. 352; to such of the poor and needy and fatherless of J. and M. townships as are not able to support themselves, *Urmev v. Wooden*, 1 Ohio St. 160; to a church, to be laid out in bread annually for ten years, for the poor of the congregation, *Witman v. Lex*, 17 Serg. & R. 88; to a city to erect a hospital for the relief of the indigent blind and lame, *Philadelphia v. Elliott*, 3 Rawle 170; to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessities which such persons want in winter, *Grandom's Estate*, 6 Watts & S. 537; for the distribution of good books among poor people in the back part of Pennsylvania, *Pickering v. Shotwell*, 10 Pa. St. 23. See *Atty.-Gen. v. Stepney*, 10 Ves. 22; *Browne v. Yeall*, 9 Ves. 406; to found a college for white male orphans, preference being given to orphans born in the city of P., *Sohan v. Phila.*, 33 Pa. St. 9; *Phila. v. Girard*,

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the letter and spirit of the statute (43 Eliz. c. 4), or where they are made to charity generally, if there is a trustee with power to make them definite. *De Camp v. Dobbins*, 2 Stew. Eq. 36. In the case in hand the testator describes a class of persons for whose relief the trust is designed, and the duty of selection necessarily and obviously falls on the trustee. By the terms of

45 Pa. St. 9; *Vidal v. Girard*, 2 How. 128, 7 Wall. 14; to the poor of several specified churches, during the winter, at the discretion of the pastor or trustees, *Yard's Appeal*, 64 Pa. St. 95; to apply the interest for ten years to the support of the poor of N. township, then to keep the principal for the use of the county forever, *Lawrence v. Leonard*, 83 Pa. St. 206; among poor white housekeepers and roomkeepers of good character residing in P., *Phila. v. Fox*, 64 Pa. St. 169; to apply to the relief of the destitute in such manner as charity is usually distributed by the minister at large in the city of B., *Derby v. Derby*, 4 R. I. 414; to the M. church, * * * for the purchase of Bibles and religious tracts, and the distribution of the same among the destitute, *Atty.-Gen. v. Jolly*, 1 Rich. Eq. 99, 2 Strobb. Eq. 379; to found a school for testator's children and their descendants, and those of his brothers and sisters, and such of the poor children of the county as the trustees might select, *Franklin v. Armfield*, 2 Sneed 305; also *Paschal v. Acklin*, 27 Tex. 173; *Perin v. Casey*, 24 How. 465; to the city of C., for the use and benefit of the poor of said city, *Hornberger v. Hornberger*, 12 Heisk. 635; to the ministry and vestry of the parish of L., for the use of the poorest inhabitants of the said parish, being honest people, *Richmond Co. v. Tayloe*, Gilm. (Va.) 336; to be expended in the education of the scholars of poor people in the county of O., *Clement v. Hyde*, 50 Vt. 716; for the education and tuition of worthy indigent females, *Dodge v. Williams*, 46 Wis. 70; to erect an orphan asylum in or near R., * * * to be open for the reception of all orphan children in said county, and such other poor, neglected and destitute children as the managers * * * may agree to receive, *Gould v. Taylor Orphan Asylum*, 46 Wis. 106. See *Russell v. Allen*, 5 Dill. 235; to the cities of N. and B., one-half to each, for the education of the poor in those cities, *McDonogh v. Murdoch*, 15 How. 367; \$1,000 to be paid by my executor for the education of the freedmen of this nation, his best judgment and discretion to be exercised in said appropriation, *McAllister v. McAllister*, 46 Vt. 272. See *Meeting Street Society v. Hail*, 8 R. I. 234; to V. and C., to be received and loaned out by three commissioners of V. and C., and applied by them to the education and tuition of all the pauper and poor children of V. and C., whose parents are not able to support them, *Williams v. Pearson*, 38 Ala. 299; for an asylum for destitute orphan boys and girls at M., *Milne v. Milne*, 17 La. 46; for the benefit of the poor, *Loring v. Marsh*, 2 Cliff. 469; for the support of poor and old women, *Gooch v. Association*, 109 Mass. 558; for the relief of the Jewish poor, *Mayer v. Society*, 2 Brews. 385; also *Isaac v. Gompertz*, Amb. 228, note; *De Costa v. De Paz*, 2 Swanst. 490, note; for the benefit of needy single

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the gift, he is to employ the income for the purpose mentioned. For want of a trustee this court would appoint one to execute the trust. In *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294, where the gift was for the benefit of such poor persons emigrating as the trustees should consider most deserving, and the trustees declined to act, the court directed a scheme for the execution of the trust. The gift in question is a valid charity.

women and widows; for the education and instruction of poor and needy children in B., to furnish them with necessary clothing while attending school, *Swasey v. Amer. Bible Soc.*, 57 Me. 523; for the education of pious, indigent youths, *McCord v. Ochiltree*, 8 Blackf. 15; to the five monthly meetings of women Friends held in P., towards the relief of the poor members belonging thereto, *Magill v. Brown*, *Brightly* (Pa.) 346; a devise of lands for a site for the erection of a hospital for foundlings, *Ould v. Washington Hospital*, 1 McArth. 541, 95 U. S. 303; in trust for the county of A., for establishing and supporting a manual labor school for poor white children of the county, *Kinnaird v. Miller*, 25 Gratt. 107; to a lodge of freemasons, for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans, *Duke v. Fuller*, 9 N. H. 538. See *Indianapolis v. Grand Lodge* 25 Ind. 518; *Babb v. Reed*, 5 Rawle 151; *Gorman v. Russell*, 14 Cal. 535; *Thomas v. Ellmaker*, 1 Clark (Pa.) 502; *Swift v. Beneficial Soc.*, 73 Pa. St. 362; *Blenon's Estate*, *Brightly* (Pa.) 338; *Everett v. Carr*, 59 Me. 325; *King v. Parker*, 9 Cush. 71; *Vander Volgen v. Yates*, 3 Barb. Ch. 242.

Some cases, however, hold similar bequests invalid, on the ground of uncertainty, *Kendall v. Granger*, 5 Beav. 300; *Atty.-Gen. v. Fishmongers' Co.*, 2 Beav. 151; *Ewen v. Barmerman*, 2 Dow & Cl. 74; *Lyons v. East India Co.*, 1 Moo. P. C. 175; *Thompson v. Thompson*, 1 Coll. 392; *Heath v. Chapman*, 2 Drew. 417; *Limbrey v. Gun*, 6 Madd. 151; *Flint v. Warren*, 11 Jur. 665; *Beall v. Drane*, 25 Ga. 430; *Lepage v. McNamara*, 5 Iowa 124; *Trippe v. Frazier*, 4 Harr. & J. 446; *Dashiell v. Atty.-Gen.*, 5 Harr. & J. 392, 6 Harr. & J. 1; *Wilderman v. Baltimore*, 8 Md. 551; *Needles v. Martin*, 33 Md. 609; *Goodrich's Case*, 2 Redf. 45; *Gallego v. Atty.-Gen.*, 3 Leigh 450; *Heiss v. Murphey*, 40 Wis. 276; *Beekman v. Bonsor*, 23 N. Y. 298; *Owens v. Missionary Society*, 14 N. Y. 380; *State v. Prewett*, 20 Mo. 165; *White v. Fisk*, 22 Conn. 31; *Literary Fund v. Dawson*, 10 Leigh 147; *Ayres v. Methodist Church*, 3 Sandf. 351; *Burnes v. Barnes*, 3 Cranch C. C. 269; *Morse v. Carpenter*, 19 Vt. 613; *Taylor v. Keep*, 2 Bradw. 368; *Jancy v. Latane*, 4 Leigh 327.

See, further, *Loscombe v. Wintringham*, 13 Beav. 89, note; *Nichols v. Allen*, 130 Mass. 211.—REP.

Haskell v. Burdette.

CHARLES C. HASKELL

v.

FRANK BURDETTE et al.

The condition of a bond, accompanying a mortgage, was, that one F. should remit to complainant, "forthwith, immediately on receipt of the same," the proceeds of all sales of certain enumerated articles, less F.'s commissions, and that on F.'s failure so to do, the mortgagors should become liable therefor. Complainant accepted F.'s notes and post-dated check for considerable amounts for the proceeds of such sales, instead of cash remittances.—*Held*, that the mortgagors, being merely guarantors, were discharged as to the amounts of the notes and check by the extension of the time of payment by the complainant without their assent, and without reserving his rights as against them.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. F. Morrow, for complainant.

Mr. G. E. P. Howard, for defendants.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage dated June 19th, 1878, given by the defendants, Hiram Burdette and wife, to the complainant, on land in Hudson county, to secure the payment of their bond to him, of that date, in the penalty of \$2,000, and conditioned that the defendant, Frank Burdette (their son), should pay to him the amount due, or to become due (but not in any event to exceed \$2,000), under an agreement between the complainant and Frank Burdette, dated June 1st, 1878, providing that the former should forthwith remit to the latter the proceeds of all sales of papyrographs, presses and materials and printing paper immediately on receipt thereof, less the commissions agreed on between them. The defendants have answered. The mortgagors, by their answer, deny that there is any indebtedness from

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Frank Burdette to the complainant under the agreement, which they are bound by law or in equity to pay, and they set up as a defence that the former kept the agreement on his part, while the latter did not, and also that the complainant extended a credit to Frank Burdette for a longer period than one month, without any notice to them and without their privity or consent. Frank, by his answer, denies the indebtedness, and alleges that he kept the agreement, while the complainant did not. The complainant claims that there are \$2,000 due him on the mortgage. The attempt is made to show that Frank Burdette was not secured in the exclusive agency of the articles mentioned in the bond, mortgage and agreement for the "territory" mentioned in the agreement—the cities of New York and Brooklyn. But the agreement does not give him the exclusive agency. It recites that the complainant, being the owner of a certain particular process, known as the papyrograph, was then desirous of establishing an agency in the city of New York for the sale of papyrographs and the materials for refurnishing them within the two cities, and that it was therefore agreed between them that the complainant should consign to Frank, for delivery to purchasers and collection of the purchase-money therefor, so many papyrographs and [so much] materials for refurnishing the same as the latter, as factor for the complainant, should have sold within the limits of the two cities; and Frank agrees to sell those articles, and to pay over the proceeds to the complainant immediately on receipt thereof. The defence set up in the answer of the mortgagors, that the complainant extended the time for payment by taking Frank's notes and post-dated check (at ten days) for moneys due him from the latter under the agreement, is established as to part of the complainant's claim. The complainant, according to his own testimony, took Frank's notes at thirty and sixty days for moneys due him from the latter from time to time under the agreement, and says he did it to accommodate Frank. He admits that it was done without the knowledge or consent of the mortgagors. He says the first note was for \$250; that it was credited January 3d, 1879, and was paid on the 15th of that month; that on the 15th Frank was

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credited with another note at thirty days for \$250 ; that he was credited with another one at sixty days for \$300, February 10th, 1879, and on the 17th of April, 1879, with another note at three months for \$500. The transactions began under the agreement June 1st, 1878, and ended August 1st, 1879. The receipt of the post-dated check, which the complainant still holds, is not denied. The complainant claims that there is due to him from Frank a balance of \$2,098.91. The mortgagors were guarantors of the debts which might from time to time accrue under the agreement, and if the complainant extended the time for payment of any part of the indebtedness without their assent, and without saving his rights as to them, they were thereby discharged from liability as to such part. It is an established principle that where the creditor, knowing the surety to be such, without the surety's assent, and without reserving his rights as against the surety, gives time to the principal, the surety is *ipso facto* discharged from his liability, and the rule is the same as to a guarantor. The mortgagors both swear that they not only knew nothing of the giving of the notes, but supposed that Frank, who assured them that he did not owe the complainant anything, was required to pay according to the agreement. The bond, in its condition, states that the agreement provides that Frank shall remit to the complainant the proceeds of all sales of papyrographs, presses and materials and printing papers, "forthwith, immediately on receipt of the same," less the commissions agreed upon between the parties to the agreement. For the amount of the indebtedness for which the notes and check were taken the guarantors are not liable, but for the rest of the claim the mortgage is security. *Hopkirk v. McConico*, 1 Brock. 220. There will be a decree accordingly.

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executors of Abraham Ackerman, deceased, father of John A. Ackerman, and the other for \$1,000 and interest, given by John A. Ackerman, in April, 1872, to Jacob Carlock, on part only of the property. The executors, in November, 1877, filed a bill in this court on their mortgage, for foreclosure and sale of the mortgaged premises, and made the complainant a party to the suit as the owner of the equity of redemption. The complainant did not answer, and there was a final decree by default, under which the property was sold (subject to the Carlock mortgage, however) in June, 1878, and bought in by the executors. In November, 1877, Carlock filed a bill in this court to foreclose his mortgage, and obtained a final decree thereon, which was subsequently assigned to Zabriskie individually, and under the decree the mortgaged premises were sold on the same day on which the sale under the executors' mortgage took place. Zabriskie was the purchaser at that sale.

The bill states that John A. Ackerman was not indebted to the estate of his father when the mortgage of \$2,800 was given, but that, on the contrary, the estate was indebted to him, and that that mortgage was given by collusion between him and the executors for the purpose of defrauding the complainant out of his claim against the former. By the will of Abraham Ackerman the testator ordered that the residue of his estate, after payment of his debts and certain legacies, should remain in the hands of the executors, and that the interest thereof should be paid to his son John yearly during his natural life, and that after his death the principal should be equally divided among John's heirs. The will also provided that in case John should survive his wife, the principal should be paid over to him. The testator died in February, 1873, and the will was proved in March following. The inventory of the estate was proved, filed and recorded on the 1st of April in the same year. In the inventory were included two notes given by John A. Ackerman to his father, one for \$500 and the other for \$600, with interest thereon amounting, on both notes, to \$464.84; and also \$1,000 inventoried as cash in his hands. It appears clearly, from the evidence, that these were all just claims of the estate against

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him ; the item of \$1,000, correctly stated, being for money lent by the testator to John in or about 1868. The note for \$500 was given January 16th, 1867, and that for \$600 on the 5th of April, in the same year, and both were payable with interest. The complainant's debt was contracted not earlier than the latter part of the year 1873. With a view to securing these debts of John to the estate, (and another, which appeared after the filing of the inventory, for interest collected by him in his father's lifetime, and without authority, on a mortgage held and owned by his father), the executors, in accordance with their duty in the premises, sought and obtained the mortgage of \$2,800. There is no evidence of any design to defraud the complainant or to hinder him in any way in the collection of his claim. The bill alleges that John had, when the mortgage was given, large claims or accounts against the estate, which Zabriskie had promised him he should have due opportunity to present for allowance, but which Zabriskie subsequently had refused to receive, on the ground that they had not been presented within the period fixed by the order limiting creditors. It appears that John contemplated making a claim of considerable amount against the estate for board of the testator ; but it also appears that he was instigated thereto by the fact that his sister and her husband had made a large claim against the estate for board of and care for his father in the last years of his life, which had been allowed, and with the amount of which he was dissatisfied. The proof shows that Zabriskie not only discountenanced the claim which John presented, but opposed it, on the ground that it was unmeritorious, especially in view of the testator's liberality in his lifetime towards John—and John, in fact, abandoned it. Not to speak of the effect of the sales under the foreclosure suits, it is enough to say that the *gravamen* of the bill is fraud, and the proof in no wise establishes it. The bill will be dismissed, with costs.

Gould v. Gould.

EMMA R. GOULD et al.

v.

CHARLES J. GOULD et al.

A married woman, at the solicitation of her husband, made a loan of her own money to a partnership composed of her husband and her two sons, taking therefor, at the time of the loan, a written obligation of the firm payable to her order.—*Held*, that a bill for the repayment of the loan, filed after the death of the husband against the surviving partners, need not allege that the money so loaned was not only borrowed on the credit of the firm, but actually reached the firm, and was expended in its business or for its benefit.

Bill for relief. On general demurrer.*Mr. G. W. Hubbell*, for demurrant.*Mr. C. Parker*, contra.

THE CHANCELLOR.

The bill is filed by Emma R. Gould, widow of Joseph Gould, deceased, and her mother, Jeannette Devine, against Charles J. and George Gould, surviving partners of the late firm of Joseph Gould & Sons, of the city of New York. That firm was composed of the defendants and Joseph Gould, before men-

NOTE.—A married woman may, at common law, be a mortgagee. *Marshall v. Lewis*, 4 Litt. 140; *Trimble v. Reis*, 37 Pa. St. 448; *Hatz's Appeal*, 40 Pa. St. 209; *Campbell v. Galbreath*, 12 Bush 459. See *Moore v. Poland*, 1 Hal. Ch. 517; *Grove v. Jaeger*, 60 Ill. 249; *McKinney v. Hamilton*, 51 Pa. St. 63.

She may maintain an action against a firm, of which her husband is a member, for services rendered the firm. *Adams v. Curtis*, 4 Luns. 164.

She may recover money loaned by her to a firm of which her husband is a partner. *Devin v. Devin*, 17 How. Pr. 514; *Lord v. Davison*, 3 Allen 131; *Bitter v. Ratham*, 61 N. Y. 512.

A *feme sole* loaned money to a firm, taking their note therefor; she afterwards married one of the partners.—*Held*, that she might sustain a suit in

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tioned. The object of the suit is to obtain repayment of a loan of \$650, made by Mrs. Gould to the firm, at the solicitation of her husband, on the 1st of May, 1876. The bill charges that the money lent was part of certain money obtained by her from the mortgage of real estate belonging to her, and conveyed to her before her marriage. It appears to have been deposited by her in a savings bank, to the account of "Mrs. Emma R. Gould, for Mrs. Jeannette Devine," and hence the latter is joined as complainant, as *cestui que trust*, with the former as her trustee. The money was borrowed by Joseph Gould, for the firm, and a written obligation of the firm, payable to the order of Mrs. Gould, was given by him to her therefor, at the time. After his death, she brought suit at law against the defendants in this suit, his surviving partners, upon the obligation, but was nonsuited, on the ground that the contract was made by her with her husband. A wife may maintain a suit in equity against her husband on a contract made by him with her, in reference to her separate estate. While this proposition is not denied by the defendants, they insist that inasmuch as the contract in question was made by the husband, and therefore is void at law, equity will not enforce it against his surviving partners, unless it ap-

equity for an account against the firm therefor. *Bennett v. Winfield*, 4 Heisk. 440.

Where a due-bill was given by a firm to one of the partners, for a debt due to him from the firm, and he assigned it to his wife, for money owing by him to her.—*Held*, that she could enforce it against the firm, although the amount of it had been allowed by the firm to the husband, in their settlement with him, after its assignment to his wife. *Moore v. Foote*, 34 Mich. 443.

A wife was creditor of a firm of which her husband was a partner, and held the firm's notes for the debt. That firm dissolved by the retiring of one member, not the husband, and the substitution of a new member, who assumed the liabilities of the retiring one.—*Held*, that the new firm was liable to the wife, and the fact that payment of interest on the notes was made after the dissolution, by the husband, on behalf of the firm, made no difference, since the firm was presumed to know what was done by any of its members in the course of its partnership dealings. *Osborn v. Osborn*, 36 Mich. 48.

On the death of B., the firm of B. & Co. owed his widow a sum of money. The widow married V., the surviving partner of B. & Co., who formed a new partnership with G., the wife of V. consenting that the money should remain

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pears that the money was not only borrowed by him on the credit of the firm, but actually reached the firm, or was expended in its business, or for its benefit, or on its behalf. The bill is sufficient in its averments. It states that Joseph Gould applied to his wife to borrow the money for his firm, and on the security of the firm's obligation to be given to her therefor, and that she, being satisfied of the responsibility of the firm, was willing to lend the money, if she could safely do so, and therefore consulted counsel on the subject, and was by him advised that she could make a legal contract with the firm through her husband, and that a negotiable instrument made by him, in the name of the firm, would bind all the partners, and she thereupon lent the money accordingly. In the statement of pretences it is said that the defendants allege that she lent the money, not to the firm, but, in fact, to her husband, and that he, with her knowledge, applied it to his own use, and not to the use of the firm; but the complainants deny that this allegation is true, and aver that she refused to lend the money to him for his own use, but lent it to the firm, and only consented to lend it to them on the advice of counsel, as before mentioned, and they further say

in the new firm as a loan, on which she was to be paid interest.—*Held*, that the wife of V. was a creditor, and not a member of the new firm. *Brower v. Creditors*, 11 La. Ann. 117.

A married woman advanced her own money to a firm composed of her husband and his son by a former wife, taking the firm's notes therefor, and afterwards purchased of a creditor his claim against the firm.—*Held*, that she was entitled to her *pro rata* share of the firm's assets under an insolvent assignment. *Cowan v. Mann*, 3 Lea 229.

The marriage of a mortgagee, a single woman, with the mortgagor, was held not to cancel it, nor suspend her right to foreclose it. *Power v. Lester*, 17 How. Pr. 413, 23 N. Y. 527; also *Bemis v. Call*, 10 Allen 512; *Bean v. Boothby*, 57 Me. 295; *Faulks v. Dimock*, 12 C. E. Gr. 65. But see *Smiley v. Smiley*, 18 Ohio St. 543; *Tucker v. Fenno*, 110 Mass. 312; *Long v. Kinney*, 49 Ind. 235.

If a married woman and her husband are the only partners in a firm, his estate is liable to her for moneys advanced by her for the use of the firm. *Boyle's Estate*, 1 Tuck. 4. See *Sherman v. Elder*, 1 Hilt 178, 24 N. Y. 381; *Kinthead's Case*, 3 Biss. 405; *Westphal v. Henney*, 49 Iowa 542; *Reiman v. Hamilton*, 111 Mass. 245; *Zimmerman v. Erhard*, 8 Daly 311.—REP.

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that if he did not use the money for the firm, but applied it to his own use, the complainants did not know it. The substance of all which is, that the money was, in good faith, lent by her to the firm, and was not in any way lent to her husband, individually. In the statements of the bill, the transaction in question appears to have been in good faith. Equity will impose no condition to recovery in such a case as this, which the law would not impose were the suit maintainable there. The demurrer will be overruled.

SARAH ANN DAWES

v.

AARON TAYLOR et al.

1. Where no special ground of equitable jurisdiction is alleged, a bill to restrain a sheriff from selling, under execution, lands claimed to belong to a person other than the defendant in execution, cannot be maintained.

2. If a bill is demurrable and allowed by the defendant to proceed to a hearing, and then dismissed for want of equity, the dismissal will be without costs.

Bill for relief. On final hearing on pleadings and proofs.

Mr. S. M. Schanck and *Mr. J. Buchanan*, for complainant.

Mr. W. D. Holt, for defendants.

THE CHANCELLOR.

The bill is filed to restrain the defendant, Aaron Taylor, and the sheriff from selling under execution on a judgment obtained by Taylor against John Dawes, certain real estate, the title to which, at the time of the recovery of the judgment, was held by the complainant as owner thereof. The injury apprehended, and which the bill is filed to avert, is a cloud upon the complainant's

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title. She is in possession of the property. The bill is filed under the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." It is merely intended to bring to trial here the question as to the validity of the complainant's title to the land, and to restrain the defendants from proceeding to sell the property under the judgment until that question shall have been decided in this court. No fraud, gross injustice or irremediable injury or other ground of equitable jurisdiction, is alleged. This court, therefore, will not entertain jurisdiction. It is the ordinary case of the threatened sale under execution against one person of property claimed by another, and equity will not take jurisdiction in such case. *Freeman v. Elmendorf*, 3 Hal. Ch. 475, S. C. on appeal, Id. 655; *High on Inj.* § 266; *Am. Dock &c. Co. v. Trustees &c.*, 5 Stew. Eq. 428; S. C. on appeal, 8 Stew. Eq. . In *Freeman v. Elmendorf*, *ubi sup.*, it was held that this court has no jurisdiction in such a case as this, but that the jurisdiction belongs to the legal tribunals. The statute above referred to, which was passed subsequently to that decision, does not confer jurisdiction where it did not previously exist. *Jersey City v. Lembeck*, 4 Stew. Eq. 255. The bill will be dismissed, but inasmuch as the defendants ought to have demurred, and not to have permitted the case to proceed to a hearing, thereby putting both parties to expense which would have been spared had there been a general demurrer, the dismissal will be without costs.

PHEBE HARRISON, complainant,

v.

EDWARD B. MARONEY et al., defendants.

The act regulating the fees of sheriffs on sales under execution, provides that they shall receive on all sums of \$1,000 and less, one per cent.; on all sums over \$1,000 and not exceeding \$3,000, one half of one per cent.; and on all sums over \$3,000, one-quarter of one per cent.—*Held*, that only one rate can

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be taken thereunder, whatever the amount of the sale, instead of one per cent. on the *first* \$1,000; one-half of one per cent. on the amount between \$1,000 and \$3,000, etc., as under the old statute.

Taxation of sheriff's execution fees.

Messrs. Blake & Freeman, for complainant.

THE CHANCELLOR.

The act relating to the fees of sheriffs (*P. L. of 1879 p. 102*), provides that those officers shall be "entitled to demand and receive, when a sale is made by virtue of an execution, on all sums of \$1,000 and less, one per centum on the amount of the sale; on all sums over \$1,000 and not exceeding \$3,000, one-half of one per centum on the amount of the sale; and on all sums over \$3,000, one-quarter of one per centum on the amount of the sale." The question presented is upon the construction of that provision—whether, in computing the sheriff's fees, where the amount raised is over \$1,000, the per centum given is to be calculated as the language of the act is, upon the amount of the sale or upon \$1,000 at one per centum, and on the excess up to \$3,000 at one-half of one per centum, and on the excess above \$3,000 at one-quarter of one per centum. The legislature manifestly intended what the language plainly imports, that the percentage in each case should be at one rate upon the whole amount of the sale, and that the rate should be governed by that amount. The language is so plain that it will not admit of any other construction. The legislature had before it the former act on the subject, which expressly and explicitly provided for a sliding scale of percentages. The legislature did not employ the language of the old law, but other language, clear and unequivocal. Its design undoubtedly was to establish a single rate of percentage on each sale: one per cent. on the amount of the sale where the amount is \$1,000 or less, and half that percentage on the whole amount where it is over \$1,000 and not over

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\$3,000; and where it is larger than \$3,000, one-quarter of one per cent. It is true that, according to the language of the act, the fees on a sale where the property brings \$2,000 will be no more than on a sale where it brings but \$1,000, and where the property brings less than \$2,000, they will be less than where it brings \$1,000; but such considerations will not authorize a different construction. The legislature has fixed the compensation by a rule, not only clear and unequivocal, but arbitrary in its character.

JAMES B. WESTERVELT

v.

GARRET G. ACKERSON, administrator &c., et al.

1. The grounds of motion under the two hundred and tenth rule, to strike out an answer in the nature of a cross-bill, need not be stated with greater particularity than would be required in a demurrer, and the grounds of a motion under the rule to strike out parts of an answer need not be stated with more particularity than would be required in exceptions to an answer.

2. On a bill filed by the next of kin against an administrator for a decree of distribution of his intestate's estate, the administrator set up by an answer in the form of a cross-bill, and by way of answer also, that part of the funds constituting the estate had been left by him on deposit in a bank where the intestate had placed it, and the balance deposited by the administrator in a savings bank after the settlement of his final account, both of said banks being then in good standing, and that said banks had, through the embezzlement of a person who was the cashier of one and the treasurer of the other, become insolvent about a month after his final account had been settled, and thereby both deposits had been lost without his negligence; and, further, that a part of the estate was claimed by one of the defendants as his individual property, on an allegation that the intestate held it on a trust for him; further, that another part of the funds of which distribution was claimed, was subject to another trust.—*Held* (without passing on the validity of the defence as to the losses), that the defences were properly pleaded, and a motion to strike them out was denied.

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Bill for relief. On motion to strike out parts of the answer of the administrator.

Mr. B. A. Vail and Mr. J. Flemming, for the motion.

Mr. J. D. Bedle, contra.

THE CHANCELLOR.

This suit is brought by James B. Westervelt, as one of the next of kin of his deceased brother Lawrence, against the administrator of the estate of the latter. The other next of kin are another brother (Richard B. Westervelt) and the sister (Ann Van Winkle) of the deceased, both of whom are made defendants. The object of this suit is to obtain a decree of distribution of the estate of the deceased among the next of kin. The administrator settled his account in the Bergen orphans court on the 13th of October, 1880. No decree of distribution was taken, and the bill prays that the balance of the estate in the hands of the administrator, according to the final account, may be distributed equally among the next of kin. The administrator, by his answer, sets up as a defence, that about a month after the settlement of the account, the Bank of Bergen County, in which he had deposited some of the funds of the estate to his credit as administrator, and the Bergen County Savings Bank, in which latter institution he had left a sum of money, placed there by the intestate, both of which banks had up to that time been in good financial standing and credit, became insolvent, so that on each of the deposits a loss is likely to be sustained. He insists that, under the circumstances, the loss should be borne by the distributees, and not by him. The answer also states the fact that Richard B. Westervelt, one of the next of kin, claims that certain notes in the administrator's hands, and which constitute part of the balance shown by the final account, are, in equity, his property. He claims that they represent the proceeds of the sale of land of his, which his father, Benjamin R. Westervelt, one of whose executors the intestate was, held in trust for him and sold, receiving the proceeds, which he held at his death.

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The answer also states that by the will of Benjamin R. Westervelt, the executors were directed to invest the residue of the testator's estate, and pay the interest of it to certain persons, some of whom are still living; and it also states, that the residue was, at the death of the intestate, in his hands, and now constitutes part of the balance in the hands of the administrator. All these matters are set up in the answer by way of cross-bill, under the two hundred and ninth rule of this court, as well as by way of answer. The complainant now moves, under the two hundred and tenth rule, to strike them out as pleaded by way of cross-bill for want of equity, and as pleaded by way of answer for impertinence. And here it may be remarked, as a matter of practice under the last-mentioned rule, that the reasons to be stated in the notice of motion to strike out, need not be more particular where the objection is to a bill or to an answer by way of cross-bill, than would be required on demurrer; or where it is to an answer than would be required on exceptions. One object in making the rule just referred to, was to avoid the difficulty which pleaders sometimes found in determining whether matter of defence could be sufficiently set up by answer, or whether a cross-bill was necessary. Therefore, inasmuch as no answer is required to the matter set up under the rule by way of cross-bill, such matter will be permitted to stand, unless it appears clearly that it ought not to be allowed to encumber the record.

To consider the objections to the answer: It has never been decided in this state that, where a trust fund is lost under the circumstances stated in the answer, the trustee is liable. The administrator alleges, in the answer, that he exercised reasonable care, skill and caution in the matter, and treated the funds in those respects as he would have dealt with his own money, and that the banks were of good repute for financial credit and standing, and failed because of embezzlement of their funds by the person who was cashier of the one and treasurer in the other; the fact of which embezzlement was not discovered until just before the failure of the institutions. The funds in the savings bank were money which was deposited there by the intestate and interest thereon, and those in the other bank were deposited

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in the name of the administrator as such. The administrator seeks relief in regard to the issue, and it is no ground of objection in this case that he seeks it, well, by way of answer and cross-bill.

As to the other grounds of objection: The complainant seeks to divide the balance which is in the hands of the administrator, equally among the next of kin of the intestate. But Richard B. Westervelt claims part of it which is in certain promissory notes as his individual property, held in trust for him by the intestate, and therefore not distributable among the next of kin, and has given the administrator notice of his claim. It is obviously proper for the administrator to set up this claim in answer to the complainant's prayer for a distribution of the whole balance among the next of kin. It appears that Richard B. Westervelt sets it up in his answer in this suit.

As to the money which constitutes the residue, or some part of it, of the estate of Benjamin R. Westervelt, the administrator has received it subject to a trust. And though the trusts under the will of Benjamin R. Westervelt devolve on the complainant as surviving executor, the administrator is bound to see that the trust property in his hands is protected and preserved. *Perry on Trusts* § 344. It is incumbent on him, therefore, to bring to the knowledge of the court the fact that part of the fund which the complainant seeks to distribute as the individual property of the intestate, is a trust fund, to the end that whatever ought to be done in regard to it, may be done. As to the notes, the cross-bill is of the nature of a bill of interpleader, and as to the residue of the estate of Benjamin R. Westervelt, the administrator not only resists the distribution of it under the statute of distributions, but asks the direction of this court with reference to a trust fund which has come to his hands. The motion will be denied, with costs.

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COURTLANDT P. DIXON

v

AALT VANDENBERG et al.

Where the remedy at law against the executors and devisees of a deceased surety on a bond is adequate, equity will, of course, not interfere; and even if there were no remedy at law, equity would not, in the absence of fraud, accident or mistake, give one against the representatives of the deceased surety.

Bill for relief. On final hearing on pleadings and proofs.

Mr. R. Wayne Parker, for complainant.

Mr. J. W. Griggs, for defendants.

THE CHANCELLOR.

This suit is brought by the assignee of a bond for \$2,450, payable in four years, with interest, given by Aalt Vandenberg and Cornelius Van Winkle, May 4th, 1869, to Jacob J. Allen. Vandenberg and his wife gave a mortgage on the property of the former to secure the payment of the bond. The bond and mortgage were assigned by Allen, March 12th, 1874, by deed of assignment with guaranty, to Elias A. Wilkinson. Van Winkle died June 9th, 1873, leaving a will, of which Simon Peter Van Winkle and Socrates Tuttle are the executors. Vandenberg sold and conveyed the property to Albert M. Bigelow, taking from him a mortgage to secure part of the price, and the latter assumed the payment of the mortgage to Allen, before mentioned. After Van Winkle's death, Wilkinson began a suit for foreclosure of the mortgage in this court, to which he made the executors of Van Winkle parties, praying a decree for deficiency against them. They answered, setting up the fact that their testator was only a surety on the bond, and denying their liability to pay deficiency until after recourse should have been

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had, first to Bigelow and then to Vandenberg. In consideration that the complainant in that suit would abandon all claim against them for deficiency therein, they consented to an order of reference and a final decree for sale of the mortgaged premises, which were made and entered accordingly, and no decree for deficiency taken against them. The final decree directed that the premises be sold to pay, first to Wilkinson the amount due on the Allen mortgage, with interest and costs, and next to Vandenberg the amount due on his mortgage, with interest and costs. The property was advertised for sale by the master, to whom the execution was directed and delivered, and in March, 1875, Bigelow, in order to prevent the sale, borrowed \$2,200 of Courtlandt P. Dixon, the complainant in this suit, to be secured by an assignment of Wilkinson's interest in the decree for foreclosure, and borrowed also of Vandenberg \$350 on his own note, and with those moneys paid to the master the amount due Wilkinson, and the master, with Vandenberg's consent, returned the execution (by mistake endorsing on it a certificate that the Wilkinson claim was satisfied), without further proceedings thereon. Wilkinson, by deed of assignment, assigned the decree to Dixon. Subsequently, the latter caused the property to be sold under the execution, and it brought only \$200, or thereabouts. He then, by petition, obtained an amendment of the master's return, by striking out the statement that the Wilkinson claim had been satisfied. Subsequently he filed this bill. It alleges that Vandenberg is insolvent, and that Bigelow has been adjudged a bankrupt, and that Van Winkle left an estate sufficient to pay the deficiency, and prays a decree establishing the liability of Allen and the executors, heirs and devisees of Van Winkle, to pay the money due on the bond and the costs of this suit. The bill is filed to enforce an alleged liability, which it avers is not enforceable at law. But, though the bond in question is joint and not several in its terms, the statute provides for the bringing of suit against the executors in the same manner as it might have been brought if the obligation had been several as well as joint. *Rev. p. 742.* The complainant, therefore, is not compelled to come into equity in order

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to reach Van Winkle's executors. And, as to his devisees, the statute gives an action at law against them. *Rev. p. 176*. If it were not so, if the complainant had no action against the executors or against the devisees, equity would not, especially under the circumstances of this case, aid him in obtaining payment from them of the money due on the bond. For if there is no remedy at law against the representatives of the deceased surety, equity, in the absence of fraud, accident or mistake, will give none. *Brandt on Suretyship* § 117; *United States v. Price*, 9 How. 83; *Risley v. Brown*, 67 N. Y. 160. And it makes no difference whether the creditor knew when he took the instrument that the deceased was not a principal, but a mere surety; for the application to equity to extend the liability of the obligor, is based on the consideration that both of the obligors participated in the consideration, from which a presumption arises that the parties intended that the obligation should be joint as well as several, but through fraud or mistake it was made joint only. The presumption, however, does not arise in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation to pay the obligee independently of his covenant. *Pickersgill v. Lahens*, 15 Wall. 140. The bill will be dismissed, with costs.

EDWIN A. LISTER

v.

HANNAH A. LISTER.

1. Where lands are bought and paid for by a husband, but the title thereto put in the name of his wife, the ordinary presumption of a settlement, which in this case was fully corroborated by his actions and declarations at the time of the purchase and transfer, cannot be rebutted by his subsequent declarations, nor by his present declarations of his intention then.

2. Nor will equity aid him on account of the subsequent adultery of the wife, and his consequent divorce from her therefor.

3. Nor will any possibility of curtesy in the property entitle him to relief.

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street, in Newark, from John Williams, for \$1,100, which he paid, and took the title for the property in his own name. On the 28th of May, in the same year, he bought an adjoining lot of the same person, for \$5,000, which he paid, and by his direction, the deed therefor was made to his wife, and at the same time he transferred the title of the other lot to her. In 1873 he bought three lots on Warwick street, in the same city, of his brother Alfred, for which he paid \$3,700. These lots were, by his direction, conveyed by his brother to John Williams, in order that the latter might convey them to the defendant, which he did accordingly. On the first-mentioned lot, in Nichols street, the complainant erected a brick dwelling-house of three stories, and he repaired and otherwise improved the frame dwelling-house which was on the other Nichols street lot. He also built a stable on the Warwick street lot. Subsequently, the Nichol street properties were exchanged for a large lot of land on South Broad street, in the same city, and another lot of land on Thomas street, in the rear of the South Broad street property, was subsequently purchased, and the title to those properties was taken in the name of the defendant. On the South Broad street property,

The same rule applies to an advancement made by a parent to a child, *Betts v. Francis*, 1 Vr. 152, 156, 159; *Christy v. Courtenay*, 13 Beav. 96; *Williams v. Williams*, 32 Beav. 370; *O'Brien v. Sheil*, L. R. (7 Irish Eq.) 255 [which criticises *Devoy v. Devoy*, 3 Sm. & Giff. 403]; *Curtwright v. Wise*, 14 Ill. 417; *Sanderlin v. Sanderlin*, 24 Ga. 583; *Sharp v. Maxwell*, 30 Miss. 589; *Bradsher v. Cannady*, 76 N. C. 445; *High v. Stainback*, 1 Stew. (Ala.) 24; *McKane v. Bonner*, 1 Bail. 113.

Subsequent misconduct of the wife does not affect or invalidate a settlement, even where a divorce may have been obtained by the husband therefor, *Bent v. Bent*, 44 Vt. 555; *Edgerly v. Edgerly*, 112 Mass. 175; *Orr v. Orr*, 8 Bush 156; *Baggs v. Baggs*, 54 Ga. 95; *Johnson v. Johnson*, Walk. Ch. 309; *Porter v. Porter*, 27 Gratt. 599; *Charlesworth v. Holt*, L. R. (9 Exch.) 38. See *Marrall v. Marrall*, L. R. (6 P. D.) 98; *Weathersby v. Weathersby*, 39 Miss. 652; *Huntly v. Huntly*, 6 Ired. Eq. 514; *Vreeland v. Ryno*, 11 C. E. Gr. 160, 12 C. E. Gr. 522. As to antecedent misconduct, see *Grove v. Jeager*, 60 Ill. 249; *Chew v. Chew*, 38 Iowa 405; *Switzer v. Switzer*, 26 Gratt. 574.

Equity will not relieve where the settlement or conveyance was made in the expectation that the wife would die before her husband, when in fact she survived him, *Spring v. Hight*, 22 Me. 408; *Andrews v. Oxley*, 38 Iowa 580. See *Cotton v. Wood*, 25 Iowa 43; *Bettle v. Wilson*, 14 Ohio 257.—REP.

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four costly dwelling-houses were erected, after the exchange. The complainant alleges, and the proof establishes the claim, that he paid, with his own money, the whole of the purchase-money of the lots exchanged for the South Broad street property, and of the Warwick street lot, and the cost of the improvements thereon, also the difference between the valuations of the properties exchanged ; also what was paid for the Thomas street property, and all the cost of the dwelling-houses erected on the South Broad street land, and the interest on the mortgages on the properties, and all taxes, insurance, water-rents and repairs. He states the amount so paid for the properties and improvements, not including taxes &c., at about \$60,000. In addition, he is liable on a bond for \$16,000, given by him and his wife, and secured by a mortgage on the South Broad street property. It may be stated that he is, irrespective of his claim in this suit, a man of large estate. As before stated, the divorce was granted in November, 1879. The bill in this suit was filed December 8th, in that year. It states that the properties were purchased by the complainant with his own money, and that the title thereto was put in the name of his wife, in trust, for the benefit of himself and his wife and family, as such, and not as a settlement upon her, and it prays that she may be decreed to convey the South Broad street and Thomas street properties, and the Warwick street property, to him. The defendant, by her answer, denies the alleged trust, and avers that the conveyances made to her were intended as gifts, and that the expenditures made by the complainant on the properties were voluntarily made.

The deeds to the defendant express no trust, nor is there any written evidence of any. The complainant claims that a trust resulted in his favor from the payment of the purchase-money by him. When a man purchases land and causes it to be conveyed to his wife, the presumption is, that it is a settlement upon her, but it is a question of intention, and the presumption may be rebutted. The burden of proof is upon him. The bill, indeed, states, and the complainant testifies, that in placing the title to the property in the name of his wife, he acted upon the

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urgent suggestion and request of her and John Williams, before mentioned (who, the bill alleges, was on terms of friendly intimacy with him), and because he believed it would be wise to vest in her the title to some of his property, for the benefit of himself and family. But his allegations in this respect are not only not corroborated by anything in the cause, but are flatly contradicted by both his wife and Williams. The former alleges and swears that the deeds to her for the properties in Nichols and Warwick streets, were deeds of absolute gift, and that the Nichols street property was exchanged by her, as her own, for the South Broad street property, and that the Thomas street property was bought by her, on her own account, and for herself, and that all the payments for purchase-money, improvements and taxes &c., which were made by the complainant were either voluntary or in consideration of the occupation of the property, or some part of it, by him with his family. The evidence shows that the complainant recognized the defendant as the separate owner of the property in question, notably by declaring, when the exchange for the South Broad street property was proposed, that she could do as she pleased about exchanging it; that the Nichols street property was her own, and she could do as she liked; and when, in November, 1877, the parties made mutual wills, the complainant told the lawyer by whom the wills were drawn, that the property was her separate estate. By the wills, each gave to the other his or her estate, absolutely. In these instances he declared that the property was her separate estate, and disclaimed all interest in it. She urges that in his petition, filed in the suit for divorce, he states that he has provided for her liberally, and established and furnished for her and his family a comfortable, and even elegant, residence and home (one of the South Broad street houses), and settled upon her that residence, and a large amount of valuable real estate, but he proves, by his solicitor, that the language of that statement is the language of the pleader and not of the petitioner, and, as evidence in the case, the statement of the petition is of no weight.

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The deeds for the properties to the defendant are confirmatory of her statement. They express no trust. The deeds for the South Broad street and Thomas street properties convey them to her in fee to her own absolute use. The complainant knew that the title to the properties was granted absolutely to his wife, and that the deeds expressed no trust. Indeed, he says it was part of his design to guard the properties against possible reverses to him in his business, and it is manifest that he would have been perfectly satisfied to permit the title to remain as it was, if he had not been divorced from her. He does not allege that it was mutually understood between her and him that the property was to be his, but that he himself intended, not that it should be his, but that she should hold it in trust for the use of himself and herself and their children. The Nichols street lot, which was bought in 1869, and the Warwick street property were not conveyed by the vendor to the defendant, but to the complainant himself; and, as before stated, he subsequently voluntarily conveyed them to Williams, in order that the latter might convey them to the defendant as he did. The South Broad street property was conveyed to her by the executors of Owen McFarland, deceased, in consideration of the Nichols street properties, and the Nichols street lot, which was bought in 1870, and the Thomas street land, were conveyed directly to her by the vendors. As to the first-mentioned Nichols street properties and the Warwick street property, the defendant's title arose by voluntary conveyance thereof to her, and it cannot be impugned by parol proof of a trust. Says Mr. Hill, in his work on Trustees:

“It is the clear result of the authorities that where a person, a stranger in blood to the donor, and *a fortiori* if connected with him in blood, is in possession of an estate under a voluntary conveyance duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest, unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust; and he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him.” *Hill on Trustees* 170.

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And where the deed contains a clause that the estate is had and held to the use of the grantee, his heirs and assigns, to his and their use and behoof, no trust can result; as it is a rule that when a use is declared, no other use can be shown to result. *Perry on Trusts* § 162. No trust can be shown by parol evidence against a voluntary conveyance. *Hill on Trustees* 106, 107. Nor will the fact that the parties are husband and wife, withdraw the transaction from the statute of frauds. *Perry on Trusts* § 164; *Osborn v. Osborn*, 2 Stew. Eq. 385. The defendant's title to the Nichols street property, which was bought in 1869, and the Warwick street property, cannot be affected by any evidence in this suit. As to the other properties and the improvements thereon, the proof does not establish the fact that, so far as the complainant's expenditures are concerned, they were not gifts from him to the defendant. The complainant did not cause the South Broad street property to be conveyed to the defendant. She bought it herself, and gave in payment the Nichols street properties, to which she had title.

Again, it should be remarked, the trust which the complainant endeavors to establish is one which was for the benefit of the defendant herself as well as of himself and their children. The complainant relies upon his own testimony as to what was his intention—not as to what was his declared intention at the time of or antecedently to the transactions, but what he now says was his intention at that time. Such testimony was admitted and prevailed in *Devoy v. Devoy*, 3 Sm. & Giff. 403, and the decision in that case was followed in *Stone v. Stone*, 3 Jur. (N. S.) 708, and Mr. Perry, in his work on Trusts, lays it down on the authority of those cases, that the real purchaser, if otherwise competent, may be a witness to state what his objects, purposes and intentions were in taking the title in the name of his wife or child. *Perry on Trusts* § 147. On the other hand, it is said by Mr. Lewin, that where a father buys and puts the title in his son, he may prove a parol declaration of trust by himself, either before or at the time of the purchase; not that it operates by way of declaration of trust (for the statute of frauds would interfere to prevent it), but as the trust would result to the father were it

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not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration. He adds that, of course, the father cannot defeat the advancement by any subsequent declaration of his intention. *Lewin on Trusts* 250. Said Lord Langdale in *Sidmouth v. Sidmouth*, 2 Beav. 447: "The law applicable to cases of this nature is subject to so little doubt, that it has not been questioned in the argument of this case. Where property is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favor of the person who pays the purchase-money and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence manifesting an intention that the child shall take as a trustee; and in this case, as in most others of the like kind, the only question is whether there is such other evidence. That cotemporaneous acts and even cotemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so; but, generally speaking, we are to look at what was said and done at the time." In view of the established principle that to overcome the presumption of advancement or settlement, the declarations of the father or husband subsequent to the transactions are not admissible, it is impossible to see any ground for admitting his testimony as to what was his intention, unless he declared or expressed such intention before or at the time of the transaction—that is, unless he testifies now as to what he said or did then. But if the evidence in question be considered, it is overcome by the counter-testimony of the defendant and her witnesses.

Nor can any relief be granted on the ground that the defendant has been guilty of adultery, and the complainant has been divorced from her for that cause. In this connection, it is urged

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that to permit the defendant, who has been guilty of infidelity towards the complainant, who, for that cause, has by law been divorced from her, not only to deprive him and their children of all benefit of the property in question, but with it to live, perhaps in luxury, with the partner of her guilt, is contrary to equity, and is a wrong for which equity will find a remedy. But that is no ground for relief. In *Dixon v. Dixon*, 8 C. E. Gr. 316, it was held that a conveyance made by a husband to a trustee, for the use of his wife, on the execution of articles of separation between them, would not be set aside on account of the subsequent adultery of the wife, while living apart from her husband. See, also, S. C., 9 C. E. Gr. 133. The adultery of the wife has been held to be no defence to a suit for specific performance of marriage articles. *Sidney v. Sidney*, 3 P. Wms. 269. In a suit for an annuity under an agreement of separation between husband and wife, a plea of subsequent adultery of the wife and a consequent divorce was held bad. *Jee v. Thurlow*, 2 B. & C. 547; *Field v. Serres*, 4 B. & P. 121; *Baynon v. Batley*, 8 Bing. 256. See, also, *Forrest v. Forrest*, 9 Abb. Pr. 289. In *Seagrave v. Seagrave*, 13 Ves. 439, there was a separation between husband and wife on account of the adultery of the latter, and a bond was given by the husband for the support of the wife, and it was held, on bill filed by the wife, that the fact that she had subsequently been guilty of adultery did not disentitle her to relief. The complainant's right to the aid of equity depends entirely on the nature of the title of the defendant, irrespective not only of the fact of her adultery, but of his consequent divorce from her. If the equitable title to the land was his when she took the legal title, he would be entitled to relief. And to that end, under the bill, he must establish a trust. His effort to establish a resulting trust has failed, for, as to part of the property, he conveyed it to her by voluntary conveyance, and produces no legal evidence of trust as to that land. As to the rest, at best, he could only claim a resulting trust as to part, for part of the consideration was paid with her property, and he has not overcome the presumption of settlement as

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to the consideration which he paid and the money which he expended upon the property. In this case there is no ground for a claim to relief on account of the previous adultery of the wife, unknown to her husband at the time of the settlement, for it is very clear, from his own testimony, that he was well convinced of her infidelity to him before any of the conveyances to her were made. But, however that may be, the bill makes no claim to relief on that ground.

It is urged that, at all events, the complainant is entitled to consideration on the ground that he has a right to curtesy in the property. But if the marriage had not been dissolved he would have no tenancy by the curtesy initiate, and none at all in the property, unless his wife should own it at her death. If the divorce has not destroyed all his claim to curtesy in any event, the possibility that she will own the property at her death, would be no ground for equitable relief. The bill will be dismissed, but without costs.

In the matter of BENJAMIN S. JAMES, alleged to be a lunatic.

1. An order for a commission in lunacy advised by a vice-chancellor, is the order of the chancellor himself.

2. An inquisition finding the alleged lunatic "of unsound mind, so that he is not capable of the government of his lands, tenements, goods and chattels," is sufficient, though it does not state that he is also incapable of governing himself.

Motion to set aside the inquisition.

Mr. A. Flanders, for the motion.

Mr. C. E. Hendrickson, contra.

THE CHANCELLOR.

Two objections are made to the proceedings. One is that the order for the commission was signed on the advisory certificate

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of a vice-chancellor; the other, that the inquisition, though it finds that the alleged lunatic is "of unsound mind, so that he is not capable of the government of his lands, tenements, goods and chattels," does not state that he is incapable of governing himself. As to the first objection, it is enough to say that the order is in no sense the order of the vice-chancellor who advised the chancellor to make it, but is the order of the chancellor himself. As to the other, the return is that the alleged lunatic is of unsound mind, so that he is incapable of the management of his property. "Being *non compos*, of unsound mind," says Lord Hardwicke (*Ex parte Barnsley*, 3 Atk. 168), "are certain terms in law, and import a total deprivation of sense, and courts of law understand what is meant by *non compos* or insane, as they are words of a determinate signification." When the return is, as in the case in hand, that the alleged lunatic is of unsound mind, so that he is incapable of managing his property, there is therefore a necessary implication that he is incompetent to govern himself. It is not necessary that the finding should expressly include the fact that the subject of the commission is unable, by reason of his insanity, to take care of himself. It is enough if the inquisition finds that he is of unsound mind, so that he is incapable of managing his estate. In *Matter of Bruges*, 1 M. & C. 278, the return was that the alleged lunatic was a lunatic, and did not enjoy lucid intervals, and that she had been in the same state of lunacy from the time of her birth. The chancellor (Lord Cottenham) said that the finding as it stood was a contradiction in terms, and that the proper finding would have been that she was of unsound mind. "The usual return since the proceedings have been in English," says Mr. Stock, "is 'idiot,' or 'lunatic,' with or without lucid intervals, or 'of unsound mind and incapable of managing his affairs.'" *Stock on Non Comp.* 104. See, also, *Shelf. on Idiots* 108. In *Matter of James Barker*, 2 Johns. Ch. 232, the petition for the commission, while it stated that Barker was "so far deprived of his reason and understanding as to be wholly unfit and unable to manage his affairs," was silent as to his competency to take care of himself. Chancellor Kent directed that the inquiry should

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be whether he was “of unsound mind or mentally incapable of managing his affairs,” and the return was that he was of unsound mind, and mentally incapable of managing his affairs. “It is sufficient,” said Lord Eldon (*Gibson v. Jeyes*, 6 Ves. 266), “that the party is incapable of managing his affairs.” In *Matter of Wendell*, 1 Johns. Ch. 600, Chancellor Kent directed an issue to try an allegation of lunacy, stating the question to be tried as follows: Whether the alleged lunatic “be a lunatic or mentally incapable of managing his own affairs.” In *Covenhoven’s Case*, Saxt. 19, the return appears to have been that Covenhoven was, at the time of taking the inquisition, “a lunatic, and of unsound mind, and that he had been in the same state of lunacy for five years.” The like return was made in *Vanauken’s Case*, 2 Stock. 186. The motion is denied.

IN RE GASTON TRUST.

1. Trustees are bound to keep clear and accurate accounts, and in case doubts or obscurities arise from their failure to do so, they should be resolved against the trustees. If the accounts of a trustee become lost through his carelessness, he should be required to bear any injurious consequences arising from their loss.

2. Sureties stand bound for the defaults and fraud of the trustee, and have no right to any favor or immunity that would not be accorded to the trustee.

On petition, order to show cause, and depositions.

Mr. A. A. Clark, for application.

Mr. James J. Bergen, contra.

VAN FLEET, V. C.

This is an application on behalf of the sureties of a trustee to open his account. His account has been stated by a master, and confirmed by the court, after service of a rule nisi. The

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reason the sureties desire to have the account opened is, that allowance may be made to the trustee of a credit which the master disallowed. In the account presented by the trustee he claimed two credits in this indefinite form :

" **For** cash paid William K. Gaston.....\$1,175 00
" **Cash** advanced to William K. Gaston..... 550 00"

The trustee was required to prove both. The master, after hearing his proofs, allowed the last and rejected the first.

The action of the master, on the proofs presented to him, is conceded to have been correct. The trustee then testified that there was a time when his account showed a balance against his *cestui que trust* of \$1,175. In his subsequent examination, under the order to show cause, he fixed the time when this balance was struck as some time during the year 1867. In further testifying before the master, he said, in speaking of the \$1,175 :

" This amount may have been subsequently reduced by dividends received, which I retained to pay me what he owed me, so that subsequently he was only overpaid the \$550, which I have charged as a subsequent item of my account; if I had my book I could explain it better; I do not claim that the \$1,175 was due me at the time when I paid him the last money, which I personally paid; I think the account balanced except so far as the \$550 was concerned; this item of \$550 was the balance due me at the time I made the last advance to my *cestui que trust* on the dividends, and at the time my sureties took the collection of the dividends into their hands."

His sureties assumed the collection of the dividends in January, 1869.

This evidence of the trustee presented a plain statement of facts which was easily comprehended, and left the master but one course to pursue. If he believed the trustee's statements, he was bound to give him credit for the item of \$550, and disallow the other. He clearly admitted that the \$1,175 had been paid, and showed how it had been paid, namely, by the retention of dividends which he had collected for his *cestui que trust*. But the trustee now says, in his evidence taken under the order to

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show cause, that he has been entirely misunderstood, and mean to say what he did not mean. He says what he meant to say, what he thinks he did say, was, not that he had re-imbursed himself for the \$1,175 by retaining dividends, but by charging himself with the market value of the privilege which accrued to trust in 1866, to subscribe for fifty shares of new stock at par to be issued by the Camden and Amboy Railroad and Delaware Raritan Canal Companies.

To explain : The trustee was appointed May 16th, 1866. At that time the trust property consisted of one hundred shares of the stock of the joint companies, a farm, and some personal property. The trustee, by the order of his appointment, directed to sell the farm and personal property, and purchase with the proceeds one hundred additional shares of the stock of the joint companies, and if any residue remained after such purchase and paying necessary expenses, to invest it in stock of the Central Railroad Company of New Jersey. The farm and personal property were sold very shortly after his appointment, he received their proceeds in ample time to have made the purchase of the one hundred additional shares of stock prior to January 1st, 1866, but neglected to do so. In July, 1866, the joint companies gave their stockholders the privilege of subscribing for one share of new stock, at par, for each four shares then held. The trustee purchased the one hundred shares, as directed by the court, within the time that he ought to have made the purchase; the trust would have had a right to subscribe for fifty shares of the new stock. The market value of this privilege at that time is shown to have been \$23 a share, making a total of \$1,175. The trustee has charged himself with that sum.

The trustee's two statements, it will be observed, are absolutely irreconcilable. The first is, that in less than two years after he had assumed the duties of the trust, he had overpaid his *cestui que trust* \$1,175, but had subsequently retained a sum, out of dividends payable to his *cestui que trust*, sufficient to reduce the balance to \$550; so that in 1869 his account showed a balance in his favor of only \$550. The other is, that when the balance of \$1,175 was struck in 1867, the trustee had not charged himself

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self with the value of the stock privilege of 1866, and that subsequent to the time of striking such balance, the trustee made a further advance of \$550 to his *cestui que trust*, so that the total sum due to him after such advance, leaving out of the account the value of the stock privilege, was \$1,725; and that when he said the sum due to him had been reduced to \$550, he did not mean that it had been reduced by dividends, which he had received and retained, but that it should be reduced by charging him with the value of the stock privilege of 1866. So that his present insistment is this: that no dividends, properly so called, were ever retained by him in payment of the balance due to him, but what he meant to describe by the word dividends, when testifying before the master, was the stock privilege. Hence, he says, in order to state his account correctly, he must, if he is charged with the value of the stock privilege, be also credited with the \$1,175.

Now, as it seems to me, the account presented by the trustee and which he was attempting to elucidate when he gave his evidence before the master, shows almost conclusively that the theory upon which a change in the account is now asked, should not be adopted. The account was prepared from data furnished by the trustee. The debit side of it contains but four items, and the other only six. It will thus be seen that it was an affair of the simplest sort. The trustee had been a bank cashier and a broker. In his account he had charged himself with the value of the stock privilege of 1866, and leaves allowance for both the \$1,175 and \$550. When, therefore, he stated before the master that the balance struck in 1867 had been reduced by dividends retained, so that in 1869 it stood at \$550, he knew he stood charged with the value of the stock privilege, and just how important an item of his account it constituted. In the face of this fact, it is difficult for me to see how the least credence can be given to the trustee's present claim.

But suppose it be conceded that the trustee is right in his present theory, can the court, in view of the facts, charge the *cestui que trust* with the balance struck in 1867? The book containing the account is lost. The *cestui que trust* has never

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seen the account. The trustee does not seem to have looked at it since 1869, and he is scarcely able now to reproduce from memory a single item of it. Nobody knows what the items on either side of it are. Whether the trustee has charged himself with everything with which he is properly chargeable, and entered on the credit side nothing but what he is justly entitled to credit for, nobody can tell. In this position of affairs, to allow the credit claimed, the court must accept an arbitrary sum fixed by the trustee, in utter ignorance whether it is just or not, and without affording the *cestui que trust* the slightest opportunity either to investigate or dispute its correctness—such a thing, I venture to say, has never been done by any tribunal having the slightest acquaintance with the law defining the duties and obligations of trustees.

Trustees are bound to keep clear and accurate accounts, and in case doubts or obscurities arise from their failure to do so, they should be resolved against the trustees. If the accounts of a trustee become lost, through his carelessness, he should be required to bear any injurious consequences arising from their loss. The law imposes the duty of keeping accounts on trustees for the protection of their *cestui que trust*, and a trustee will not be permitted to defeat this salutary purpose by his carelessness.

The persons seeking the aid of the court in this matter stand bound, as sureties, for the defaults and fraud of the trustee, and have no right, therefore, to any favor or immunity that would not be accorded to the trustee. The application must be denied, with costs.

Smith v. Gaines.

ANDREW J. SMITH et al.

v.

MARQUIS D. L. GAINES et al.

A great uncle and first cousin, both being related to the person last seized in equal degree, viz., the fourth, and being his nearest surviving kindred, are entitled to succeed to his lands as tenants in common in equal parts, under the sixth section of the statute of descent.

Argued on bill and demurrer.

Mr. B. Williamson, for demurrants.

Mr. H. C. Pitney and **Mr. Barker Gummere**, for complainants.

VAN FLEET, V. C.

This is a suit for partition. The bill is filed by a great-uncle against a first cousin. The bill proceeds upon the theory that the parties to the suit were of equal degree of consanguinity to the person last seized of the lands sought to be divided, and that in consequence of his dying intestate, without leaving nearer kindred, the lands, by force of the sixth section of our statute directing the descent of real estate, descended to them as tenants in common in equal parts. To this bill the defendant has interposed a demurrer, denying that the complainant stands in equal degree of consanguinity with him to the person last seized, and claiming that he alone is the next or nearest collateral kindred of the person last seized, and as such is entitled to the whole of the inheritance. The question thus raised, it will be perceived, is one simply involving an inquiry as to whether the litigants are of equal degree of consanguinity to the person last seized.

The fact that the whole inheritance must go to a single individual, if the defendant's claim is found to be true, will not prevent him from succeeding to the whole; for though this section,

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in its literal structure, makes provision only for inheritance by "several persons all of equal degree of consanguinity," and declares that they shall take "as tenants in common in equal parts," yet it has been construed to define the right of inheritance of a single individual, as well as that of several persons, or a class. The plain design of the section has been declared to be, to give the estate to the nearest collateral kindred; if there be more than one survivor in that class, then to such survivors equally; if but one survivor, to that one wholly. *Taylor v. Bray*, 3 Vr. 182. Nor, on the other hand, is the great-uncle to be precluded from succeeding to the inheritance, because, in order to reach him, the inheritance must ascend. The first canon of descent declares that inheritances shall never lineally ascend. This canon, although modified by statute so as to let in the father, and also the mother to a limited extent, in certain designated junctures, is still in force in this state. *Bray v. Taylor*, 7 Vr. 415. But it simply excludes lineal ancestors, not collateral kindred. Littleton says:

"If there be father and son, and the father hath a brother, that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood; but it is a maxim in law that inheritance may lineally descend, but not lineally ascend. 1 Coke on Litt. 106 & 3.

The question in dispute between the parties seems to me to be entirely free from the least difficulty. It has been authoritatively settled in this state, that the civil law method of computing degrees of consanguinity is the one that must be adopted in ascertaining who are entitled to take land under this section of the statute. *Schenck v. Vail*, 9 C. E. Gr. 538. By this method you count upward from either of the persons related, to the common ancestor, and then downward again to the other, reckoning a degree for each person, both ascending and descending. 2 Bl. Com. 207; 1 Wms. on Exrs. (6th Am. ed.) 421; Bingham on Descent 299; 4 Kent's Com. 412. Computed by this rule, each of the claimants here is related to the person last seized in the fourth degree.

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To illustrate: To ascertain the degree of relationship of the *propositus* to his first cousin, we count from the *propositus* up to his father, one degree; then from his father to the common ancestor, which is his grandfather, two; then, down from his grandfather to his uncle, three; and from his uncle to his cousin, four. They are related in the fourth degree. A like computation will give the degree of consanguinity existing between the *propositus* and his great-uncle. From the *propositus* up to his father is one degree; from his father up to his grandfather is two; and from his grandfather up to his great-grandfather, who, in this computation, is the common ancestor, is three; and then, descending, from his great-grandfather to his great-uncle, is four. They, too, are related in the fourth degree. Other examples, showing how degrees are computed by the rule of the civil law, will be found given in *1 Wms. on Exrs. (6th Am. ed.) 421*; and in *3 Wms. on Exrs. 2069*, where a table is given showing computations extending to the sixth degree.

Chief-Justice Beasley, in *Taylor v. Bray, 3 Vr. 185*, announced as a proposition which, to his mind, was free from all reasonable doubt, that under this section of the statute uncles and aunts would take before, and in exclusion of cousins. The reason is evident. An uncle or aunt is related in the third degree, while a cousin stands one degree more remote. Mr. Christian, in note 58 to *2 Bl. Com. (Wendell's ed.) 516*, says:

“If the next of kin of an intestate are great-uncles, or aunts, first consins and great-nephews or nieces, they all being related in the fourth degree [by the civil law method of computation] will each be admitted to an equal distributive share of his personal property.”

But this is not a question to be solved by argument or authorities. The rule by which degrees of consanguinity are to be computed, in ascertaining upon whom the law, as prescribed by this section, casts the inheritance, having been authoritatively settled and defined by the court of last resort, the duty of subordinate tribunals is fully performed when they simply make a calculation in accordance with such rule, and pronounce judgment in conformity to the result thus ascertained.

The demurrer is overruled, with costs.

Ehler v. Turner.

ELIZABETH EHLER

v.

PHINEAS W. TURNER et al.

Simply affirming under oath that the consideration of a chattel mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred, is neither a literal nor a substantial compliance with the statute requiring the mortgagee to file an affidavit showing the consideration of his mortgage.

On application for injunction, heard on bill, answer, affidavits and order to show cause.

Mr. Allan L. McDermott, for complainant.

Mr. Flavel McGee, for defendants.

VAN FLEET, V. C.

The complainant seeks to have the defendants restrained by injunction from causing to be sold certain chattels upon which she claims to hold a chattel mortgage, and which the defendants have procured to be seized under an execution. The chattels are owned by two sons of the complainant. They executed a mortgage to the complainant on the chattels in controversy, August 17th, 1880. The mortgage was filed on the day of its date in the proper office. It was not acknowledged, and could not therefore be recorded under the act of 1880. *P. L. of 1880 p. 266.* The defendants recovered a judgment against the mortgagors on the 7th of June, 1881, and procured an execution to be issued thereon, and a levy to be made on the mortgaged chattels on the 17th of June, 1881. The defendants admit that they intend to cause the chattels to be sold regardless of the complainant's mortgage. They claim that the mortgage is void as to them. The ground of this claim is, that the consideration of the mort-

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gage was not verified at the time the mortgage was filed, as required by the statute.

The statute of 1878 (*P. L. of 1878 p. 139*) declares that every chattel mortgage made after it shall take effect, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors, * * * unless the mortgage, or a true copy of it, having annexed thereto an affidavit, * * * stating the consideration of the mortgage, and, as near as possible, the amount due and to grow due thereon, be filed in the proper office. This statute prescribes the rule by which the validity of the complainant's mortgage, as against the defendants, must be tried. An affidavit was annexed to and filed with the complainant's mortgage, in which she declared "that *the true consideration of said mortgage is as follows, viz., the sum of fourteen hundred dollars*, and the goods and chattels in the foregoing schedule are given as collateral security for said amount." The defendants insist that this affidavit conforms neither to the letter nor the spirit of the statute, but evades the test the legislature intended to prescribe by it.

The purpose of the legislature is clear. The statute was designed to prevent the use of chattel mortgages as a means of fraud. It was intended as a guard against dishonesty, and to secure fairness and good faith in such transactions. To this end the mortgagee, his agent or attorney, is required to state, under oath, the consideration of the mortgage; that is, not simply to state the amount or sum for which the mortgage is given, but to state how the debt on which it is founded arose; what was the cause of the debt, or how the relation of creditor and debtor was created between the parties. The legislature, I think, meant to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by legal investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover.

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The statute authorizing the entry of judgments on bonds, with warrants of attorney to confess judgments, contains a provision identical in purpose, expressed substantially in the same words. There can be little doubt that the provision under consideration was modeled after that, and that the legislative purpose was the same in both instances. The meaning and purpose of this provision in the act authorizing the entry of judgments, has been defined by Chief-Justice Ewing. With but a slight change in his language, I think his interpretation of that provision may be adopted as the true exposition of this. Simply changing his words so as to apply them to a chattel mortgage instead of a judgment, his exposition reads as follows: The design of the statute was to prevent the filing of fraudulent chattel mortgages, of chattel mortgages having no real, actual, honest foundation, but intended to create fictitious liens to defeat honest creditors and to cover and protect the property of knavish debtors; and one measure whereby this design was to be effected, was to require, upon the conscience of the creditor, a statement of the true consideration of the mortgage. "The consideration," says Blackstone, "is the price or motive of the contract." A statement of the manner in which the debt arose is obviously called for. Not merely what evidence has been given of the debt, * * * but what is the price of the debt, the cause of the indebtedness. Thus, if a loan of money, a sale of goods or lands, a difference of value in the exchange of horses, or whatever else it may be, is the price of the debt or the manner in which it occurred, the affidavit should set forth one or the other, according to the fact, and in doing so general terms may be used, for the legislature have not required a specification, yet it must be sufficiently precise to disclose the real nature of the transaction. *Latham v. Lawrence*, 6 Hal. 322. The same interpretation has controlled both prior and subsequent adjudications. *Woodward ads. Cook*, 1 Hal. 160; *Evans v. Adams*, 3 Gr. 373; *Reading v. Reading*, 4 Zab. 358.

Simply affirming under oath that the consideration of a mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred—whether it

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arose out of a loan, or a sale, or in any other of the numerous modes by which one person may incur a pecuniary obligation to another—cannot, in my judgment, be regarded as either a literal or substantial compliance with the statute, but should be regarded as an evasion of it. If such a test of conscience were to be held a sufficient compliance, the most beneficent purpose of the statute would unquestionably be defeated.

The direction of the statute is imperative. Unless an affidavit of the kind required by the statute is made part of the public record, the mortgage is declared to be absolutely void as against creditors. Such, I think, is the condition of the complainant's mortgage in respect to the defendants, and, therefore, the application for an injunction must be denied.

JAMES LUDLUM

v.

ALICE BUCKINGHAM and JOHN M. BUCKINGHAM.

At the death of one of two partners, the firm assets consisted of large tracts of land, factories &c., mortgaged for about \$100,000, and personal property estimated to be worth \$120,000. A bill by the representative of the decedent charged that land standing in the name of the surviving partner had been paid for by the decedent's individual means, and also charged the surviving partner with fraud and mismanagement. The surviving partner was appointed receiver of the firm's assets, with full power to settle its affairs under the direction of the court. The survivor was found to be indebted to the firm for about \$75,000, which have not yet been paid. In order to eliminate the real estate from the settlement, the survivor (the complainant) made a written proposition that he would give, or take, for the land, \$30,000, and a release of the mortgages (\$100,000) thereon, and deposit the \$30,000 in court, as part of the firm's assets, to be disposed of by the court, with a further provision that the court should have power to enforce and carry out the contract. The representative (the defendant) agreed to purchase the land on the terms stipulated. On the day fixed for consummating the bargain, the complainant attended, with his deed for the premises duly executed, but the defendant neither tendered the \$30,000 nor produced the releases of the mortgages, but

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proposed instead thereof, to charge herself with \$30,000 on account of her share of the surplus assets of the firm, and to indemnify the complainant against his liability for the mortgages. This proposition the complainant declined, and the court refused to compel him to accept; he also rejected defendant's proposition that he should buy the property, instead of defendant, on the same conditions. He then applied to the court to compel the defendant to perform her contract, or that the lands be sold and the defendant held liable to the estate for any loss incurred by her default. The court refused to interfere at that time, reserving the question whether relief might be granted thereafter, and, on appeal, that proceeding was sustained. The personal property of the firm was afterwards sold, by direction of the court, and about \$46,000 realized. Two of the mortgages were subsequently foreclosed, and a decree for \$96,000 thereon obtained. To reduce this decree, \$24,000 of the money derived from the sale of the personalty was ordered by the court to be applied thereto, and, on a foreclosure sale thereafter, the premises brought \$80,000, about enough to satisfy the balance due on the decree. Complainant files the present bill to charge the defendant with the personal loss which he has sustained by reason of her failure to perform her contract.—*Held*, that while equity may, in the absence of unfairness or imposition, enforce a contract by the representative of a deceased partner to purchase of the surviving partner the lands of the partnership, or may, in case such performance be impossible or impracticable, award compensation, if the complainant's remedy at law be uncertain or inefficacious, and such compensation be indispensable to his relief in equity, yet, if the complainant's action or inaction has hindered or prevented the defendant from performing his contract (as, in this case, complainant's failure to pay his own debt to the firm deprived the defendant of the means of fulfilling her contract), equity, in the exercise of its discretion, will refuse relief.

On final hearing on supplemental bill and answer, and proofs taken in open court.

Mr. Thomas N. McCarter, for complainant.

Mr. John M. Buckingham and *Mr. E. Q. Keasbey*, for defendants.

VAN FLEET, V. C.

The original suit in this case was brought by Alice Buckingham and her husband, John M. Buckingham, against James Ludlum. Subsequently, leave was given to Mr. Ludlum to file

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a supplemental bill against the Buckinghams, and the questions now to be determined arise on the bill filed under such leave.

For more than twenty years prior to the 9th day of June, 1874, James Horner and James Ludlum had been engaged in the manufacture of steel, files and augers, as copartners, under the name of J. Horner & Company. Mr. Horner died on the date last named. He left a will by which he gave the bulk of his estate to his daughter, Mrs. Buckingham, and constituted her his sole executrix. The provisions of his will were: first, a direction that his sister Eliza should be paid \$1,000 a year during her life; second, a devise was made to the Episcopal Church at Pompton, of his interest in about an acre of land on which their church edifice then stood; third, a devise was made to Mrs. Ludlum, the wife of his copartner, of his interest in a tract of land, not to exceed three acres, on which she was then erecting a dwelling; and then, all the rest and residue of his estate, both real and personal, was given absolutely to Mrs. Buckingham, except, to quote the will *in hæc verba*:

“One-fourth part of the same she is to hold in trust for the sole use and benefit of my daughter Susan during her natural life; and having full confidence in the love and affection of my daughter Alice for her sister Susan, I nominate and appoint her the sole guardian and trustee of her sister Susan, giving her full power and lawful authority to manage her property, and to sell and dispose of the same, by deed or otherwise, and to care for her in all respects, as in her judgment she may think best.”

The will further directed that the business of the partnership should be carried on until such time as, in the judgment of the executrix, it could be disposed of, or wound up, with advantage to the testator's estate, and to that end the executrix was given full power and authority to join the surviving partner in any bargain, sale or conveyance necessary for the interests of the firm, and to do all things necessary to carry the same into effect.

At the time of Mr. Horner's death, the firm owned about five hundred acres of land at Pompton, in the county of Passaic, on which there were mill-streams, water-power, factories and dwellings. These lands were subject to three mortgages, on which there was then due about \$100,000 of principal. The

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firm also owned another tract of land, situate at Elizabethport, in the county of Union, containing about four acres. They also owned personal property estimated to be worth \$120,000.

On the 21st day of August, 1874, Mrs. Buckingham filed her bill in this court against Mr. Ludlum, charging that the lands standing in the names of the individual members of the firm had been purchased by Mr. Horner, with his individual means, and also charging Ludlum with frauds and misconduct in the management of the affairs of the firm, both before and since Mr. Horner's death, and praying that he might be enjoined from exercising any power or authority over the partnership effects; also, for the appointment of a receiver, an accounting and the settlement of the partnership affairs. An injunction was granted, and an order to show cause made, requiring Mr. Ludlum to show cause why a receiver should not be appointed. On the coming in of Mr. Ludlum's answer, and, after argument, the injunction was dissolved and the order to show cause discharged. This order was made November 17th, 1874. A receiver was nevertheless appointed. The order dissolving the injunction and discharging the order to show cause, recites that it appeared to the court that the rights and interests of both parties would be promoted by having Mr. Ludlum act under the direction of the court in his future proceedings in settling and closing up the affairs of the partnership, and he was, for that reason, with his consent, and on motion of his own counsel, appointed receiver of the partnership assets. Power was given to him to collect and receive all moneys and property belonging to the firm, and to retain possession of all the assets of the partnership. This was done, the order declares, with a view to the ultimate settlement of the partnership affairs under the direction of the court.

The issues raised by the original bill and the answer thereto were subsequently tried before Vice-Chancellor Dodd, sitting as special master, and resulted in a decree which finds that, on its dissolution, the firm was indebted to Mr. Horner in the sum of \$476.01, and that Mr. Ludlum, at the same date, was in-

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debted to the firm in the sum of \$73,975.47. The decree directs that after the payment of the debts, and before a division of the assets is made, Mr. Ludlum shall pay into the firm the sum of \$73,975.47, with interest from June 9th, 1874, and that Mrs. Buckingham, as executrix, shall receive the sum of \$476.01, with interest from the date last named. This decree was made August 22d, 1876.

More than a year prior to the making of this decree, the parties entered into the contract which is the subject of the present controversy. Prior to the 26th day of April, 1875, it had been suggested that the adjustment of the partnership affairs would be greatly simplified, and the interests of the parties promoted, if an arrangement could be made by which the real estate would be eliminated from the settlement. For the purpose of making an attempt to effect such an arrangement, Mr. Ludlum and Mr. Buckingham met at the chambers of the vice-chancellor on the date last named, when Mr. Ludlum made, verbally, the following offers, which were reduced to writing and handed to Mr. Buckingham :

“ April 26th, 1875, Mr. Ludlum makes these alternative offers :

“ 1. Either party to say what he will give or take for the Pompton real estate, excepting the Cape May property, the party making such offer to take the Elizabethport property as a consideration for making such offer.

“ 2. Mr. Ludlum will give \$2,500 in addition to the Elizabethport property to Mrs. Buckingham, if she will offer to give or take a certain price for the Pompton real estate, except Cape May, and also all the unfinished personal property thereon.

“ The above to be carried out in good faith; details, as to time and mode of payment, to be agreed on and fulfilled fairly.”

On the 10th of May, 1875, the Buckinghams, by letter, accepted Mr. Ludlum's first proposition; that is, they agreed to convey to him the real estate situate at Elizabethport, on condition that he should name a price for the real estate belonging to the firm, situate at Pompton, which he should be bound to give or take as Mrs. Buckingham should elect. On the 9th of June following a written contract, expressing in detail the agreement thus made, was formally executed. It provided that the Buckinghams should, on or before the next day (June 10th), execute

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a deed to Ludlum for the Elizabethport real estate, and leave the same with the vice-chancellor, to be delivered to Mr. Ludlum when he fulfilled his part of the agreement. Mr. Ludlum then bound himself to make, within two weeks from the date of the agreement, and leave the same with the vice-chancellor, a written offer for the Pompton real estate, which he should be obliged to give or take, as Mrs. Buckingham should elect; and Mrs. Buckingham bound herself to make such election, in writing, on the day following that on which Mr. Ludlum deposited his offer. The agreement then provided that the vice-chancellor should fix a day when the parties should meet to perform the contract, and also designated what instruments should be executed to carry the contract into effect. It also declared that the consideration to be paid for the conveyance of the Pompton real estate should be understood to represent the firm's interest in the land, and that it should be deposited in court and be disposed of by its order. The concluding stipulation of the agreement is in these words:

“The object and intention of the covenants and agreement herein contained being, as heretofore stated, to eliminate from the chancery proceedings all questions touching the disposition and sale of the real estate of the late firm of J. Horner & Company, it is hereby agreed between the parties that the court shall have the power to issue any order necessary to enforce the terms and conditions hereof.”

Mr. Ludlum, within the time limited, made his offer. He offered to procure releases from the mortgagees of their debts, and to pay \$30,000 in cash. Mrs. Buckingham at once elected to purchase the real estate on the terms of Mr. Ludlum's offer. The 12th of July, 1875, was fixed as the day on which the parties were to meet to perform the contract. They met, and Mr. Ludlum delivered a deed to Mrs. Buckingham, in fulfillment of the contract on his part, but Mrs. Buckingham neither paid the \$30,000 nor produced releases from the mortgagees; but proposed, as a substitute therefor, to indemnify Mr. Ludlum against his liability for the mortgage debts, and to charge herself with \$30,000, on account of her share of the surplus assets of

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the partnership. Mr. Ludlum refused to consent to the performance proposed. Mrs. Buckingham afterwards applied to the court for an order directing that the deed be delivered to her, on her making such so-called substituted performance. Her application was denied. She then proposed to Mr. Ludlum that he should change places with her—let her become the vendor and he the purchaser—but this he also declined.

Subsequently, in July, 1876, Mr. Ludlum presented a petition to the court, praying that Mrs. Buckingham might be required to perform her contract, or, in case she still refused to do so, that the contract should be declared to have been broken, and, in that event, that the lands should be ordered to be sold, and Mrs. Buckingham be decreed to be answerable for any loss the partnership estate might suffer in consequence of her failure to keep her contract. Mrs. Buckingham answered this petition, and the question thus raised was decided by an order made August 29th, 1876. By this order present or immediate relief was denied, and the question whether relief should be given at all, was reserved for future consideration. This order was subsequently affirmed on appeal.

The court, on the 13th of August, 1876, at the instance of the Buckinghams, and against the opposition of Mr. Ludlum, made an order directing the personal property of the firm to be sold. It appears, from its recitals, that it was made, in part at least, to enable Mrs. Buckingham to perform her contract. Pursuant to this order the personal property was sold in the months of November and December, 1876, for about \$46,000, being \$74,000 less than the parties had previously estimated it to be worth.

Separate suits to foreclose two of the mortgages covering the Pompton real estate, were commenced June 22d, 1875. These suits were afterwards consolidated, and a final decree made in the consolidated action April 5th, 1876, for \$96,209.23. Subsequently, \$24,000 of the proceeds of the sale of the personal property was, by order of the court, applied in reduction of this decree, and on the 5th of July, 1877, the entire mortgaged premises were sold, under the decree, for a sum just sufficient to

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satisfy the balance due on it. The sum realized by the sale was about \$80,000.

The preceding narrative gives all the material facts of the various transactions which have resulted in the present demand by the parties for a judgment on their rights. They have been stated with unusual fullness and in studied detail, in consequence of their multitude and intricacy, and the novel character of the case.

The main object of the supplemental bill is to procure a decree adjudging that Mrs. Buckingham shall be charged, in the final adjustment of the partnership affairs, with such sum as will compensate Mr. Ludlum for the loss he has suffered in consequence of her failure to perform her contract. He insists that by her failure to keep her contract the partnership estate has suffered a loss of \$54,000. The argument by which he demonstrates the truth of this allegation is as follows: He says the contract required Mrs. Buckingham to discharge the firm from the whole of their mortgage debt, and to pay \$30,000 in addition; so that performance by her of her contract duty would have given the partnership estate \$30,000 for the value of its equity of redemption, which is now lost, and left untouched \$24,000 realized from the sale of the personal property, which is now also lost. The half of the aggregate of these two sums, together with the whole of such expenditures as have been necessarily made since her failure to perform, for the care and preservation of the property, he claims as the compensation which he is entitled to recover against the defendants.

The defendants deny his right to any relief whatever. They present a multitude of reasons why his whole prayer should be denied. Those possessing sufficient merit to require consideration may, I think, be grouped under three heads, and stated thus: *First*, it is contended that the contract is unenforceable in equity, because it was made by a trustee with his *cestui que trust*; *second*, it is said the complainant's claim is not the fit subject of equity cognizance, because, in the present posture of affairs, if he is successful in his suit, he must take a decree simply for damages, and that that is a species of relief which a court of equity

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is incompetent to give; and *third*, it is insisted that, in view of all the circumstances of the case, especially in view of the fact that the complainant has withheld from the partnership estate, for years, a sum more than double that which Mrs. Buckingham was required to pay, it would be manifestly inequitable to give him the relief he asks.

That the relation of trustee and *cestui que trust* existed between Mr. Ludlum and Mrs. Buckingham, both before and after his appointment as receiver, is a fact that cannot be denied. A surviving partner is trustee both for the creditors of the firm and the representatives of his deceased copartner. So it is also unquestionable that a trustee, with authority to sell, can, in no case and under no circumstances, without the permission of the court, become the purchaser of the property he is entrusted to sell, so as to acquire a title which he can maintain against his *cestui que trust*. This is a familiar rule, and the considerations of justice and policy on which it rests are so obvious that they need not be stated. But this rule does not seem to me to have any application whatever to the case in hand. The contract sought to be enforced is not a contract for the sale of the trust property either by the trustee to himself or by the *cestui que trust* to the trustee, but an affair of an entirely different character. It is a sale by a trustee of a part of the trust property to his *cestui que trust*. But what of that? True, it was made pending a litigation between the *cestui que trust* and her trustee, concerning the trust property, but what rule of law or policy inhibits such a transaction, provided it is fair and free from fraud? The law, in its anxiety to protect the interests of *cestuis que trust*, demands that trustees shall be scrupulously frank and just in all their dealings with them, but it does not go to the length of absolutely interdicting them from contracting with each other. The courts examine such contracts with a jealous scrutiny, especially when it appears that the parties did not deal at arm's length, but that the *cestui que trust* dealt, reposing great confidence in the trustee; but even in such cases, if it clearly appears that the transaction was fair, that no advantage was taken, and that no concealment was practiced, the court is bound to uphold the contract.

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The suit in which Mr. Ludlum was appointed receiver was purely an *inter partes* affair; neither the public nor the state had any concern in it. The parties being *sui juris*, were at liberty to discontinue the suit at their pleasure. Who doubts their right at any time during the pendency of the suit to make any contract which they might have thought it judicious to make, in adjustment or compromise of the matters in litigation, and that, if it was free from fraud, it would have been binding upon the parties? If they could have made a valid contract for the settlement of *all* matters in dispute, they unquestionably had a right, by the same means, to withdraw from the litigation any one of the subjects of dispute. It is as true in law as it is in mathematics, that the greater always includes the lesser.

Now while it is true that a surviving partner, who is also one of the executors of his deceased copartner, cannot make a contract with his co-executors, for the purchase of his dead copartner's share of the partnership assets, which he can enforce against the beneficiaries under the will of his dead copartner, because in such a transaction he must assume two characters so radically opposite in their duties and interests that the law will not permit the same person to represent both (*Colgate's Exr. v. Colgate*, 8 C. E. Gr. 372; *Burden v. Burden*, 1 Ves. & B. 170; *Cook v. Collingridge*, 1 Jac. 607), yet there is no rule of equity which prohibits a surviving partner, standing simply in that character and unentangled by the duties of an executor or administrator to his deceased copartner, and dealing fairly, suppressing nothing and concealing nothing, from purchasing from the representatives of his deceased copartner his share of the partnership assets. In such a transaction there may be a dangerous inequality of knowledge in respect to the subject of the contract with which the parties enter upon the negotiation, but unless it is shown that the surviving partner has taken advantage of his position, by concealing facts which he ought in fairness to have disclosed, or practiced some other unfairness, he is entitled to the benefit of his contract. To justify the court in annulling a contract made by parties holding such relations, fraud or unfairness must be shown; they are not prohibited from contracting with each other

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by the mere fact that a trust relation exists between them. *Chambers v. Howell*, 11 Beav. 6; *Lewin on Trusts* 443; 1 Lead. Cas. in Eq. 216.

If the representative of a deceased copartner may make a valid contract of sale to the surviving partner, there would seem to be no reason, when the position of the parties is reversed, and the representative is the purchaser and the survivor is the seller, why their contract should not be equally efficacious. Such contracts, whether the purchase be made by one party or the other, violate, according to my understanding of legal principles, no rule of policy or justice. If they are fair and free from fraud, I know of no reason why they should be considered even voidable.

Such, I think, I am bound to understand was the view taken of this contract by the judge who first passed upon the question whether it should be specifically performed or not, and also by the court of errors and appeals. That question, it will be remembered, was first dealt with by Vice-Chancellor Dodd, sitting as special master. He refused to enforce the contract, but his refusal was not absolute or final, but only temporary. The question whether relief should ultimately be given or not, was reserved for future consideration. His judgment was affirmed by the court of errors and appeals. *Buckingham v. Ludlum*, 2 Stew. Eq. 345. The appeal was argued by eminent counsel, distinguished alike for learning and acumen. No hint is given in the opinion of the court that anybody at that time had intimated the slightest doubt respecting the validity of the contract. In a case of such unusual character and great importance, I regard it as quite impossible that a question of such high concern should have escaped the consideration of both court and counsel.

Assuming, for the present, that the complainant has a meritorious case, the second question presented for decision is, Can this court give him relief? Actual specific performance of the contract in all its parts cannot be decreed. Two of the mortgages which Mrs. Buckingham stipulated to have released, have been discharged by the sale of the mortgaged premises under the decree of this court. The general rule undoubtedly is, that

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a court of equity will not entertain a suit for damages purely, but this rule has its exceptions. In actions for specific performance, or in actions of like nature, where the power of making compensation is indispensable to avoid multiplicity of suits, or to work out, with completeness, an equitable result, it has been held that a court of equity may properly give relief in damages. *Copper v. Wells*, Sax. 10; *Palys v. Jewett*, 5 Stee. Eq. 302.

In actions for specific performance, it seems to be settled that where the defendant has, pending the suit, deprived himself of the ability to perform, or where he has, before suit, disabled himself to perform, without the knowledge of the complainant, and the complainant brings his suit in good faith, believing that the defendant can perform a decree for specific performance, or where the complainant establishes a case clearly showing that he is entitled to equitable relief, and it appears that he has no remedy at law, or that his legal remedy is precarious, equity, although it cannot enforce specific performance, will nevertheless retain jurisdiction, and give damages or compensation, either by estimating them itself, or by awarding an issue of *quantum damnificatus*. *Morss v. Elmendorf*, 11 Paige 277; *Wiswall v. McGowan*, 1 Hoffm. Ch. 126; *Milkiman v. Ordway*, 106 Mass. 232; *Phillips v. Thompson*, 1 Johns. Ch. 131. And it has also been held that equity should not take jurisdiction in any case in which it appears that the defendant has deprived himself of the ability to perform in advance of the institution of the suit, and this fact was known to the complainant when he brought his suit, for in such case, it is said, the complainant knows when he sues that he cannot have actual specific performance, and that his suit is simply a suit for damages. *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Morss v. Elmendorf*, *supra*.

The doctrine last stated seems to be questioned in *Milkiman v. Ordway*, *supra*. It is there adjudged that jurisdiction in any case is established when it is determined that the complainant is entitled to equitable relief. Relief may then be given in the alternative, by awarding damages, unless the defendant shall specifically perform. The court say: "In many cases this would

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be an effective and proper course, inasmuch as the defendant, although not having at the time the title or capacity requisite for performance, may be able to procure it. The jurisdiction is not lost when the court, instead of such alternative decree, determines to proceed directly to an award of damages or compensation. The peculiar province of a court of equity is, to adapt its remedies to the circumstances of each case as developed by the trial. It is acting within that province when it administers a remedy in damages merely in favor of a party who fails of other equitable relief, to which he is entitled, without fault on his own part." This view, in my opinion, is founded in good sense, and is supported by sound logic, and, as a rule of justice, will much more surely effect its object, in the majority of cases, than its opposite.

The rule deducible from the authorities, I take to be this: In actions for specific performance or kindred actions, a court of equity may always, when the compensation or damages can be ascertained by a simple calculation, give relief in that form, where such relief is indispensable to the working out, with completeness, of an equitable result, or the right to relief is a matter purely of equity cognizance, or the remedy at law is precarious or extremely difficult.

Taking this rule as the best, I think there can be no doubt that, in this case, if it shall appear that the complainant is entitled to relief, this court is competent to administer it.

This brings us to the test question of the case: Is the complainant, in view of all the facts, entitled, as a matter of clear equity, to a specific performance of this contract? The remedy by specific performance is discretionary. The question in such cases is not what must the court do, but what, in view of all the circumstances of the particular case, should the court do to effect justice. Its discretion must be governed by established principles of justice and not by caprice or sentiment. As relief of this nature is a thing resting entirely in sound discretion, it has become a fixed rule of judicial action never to grant it unless it is strictly equitable, under all the circumstances of the case, to do so. *1 Story's Eq. Jur.* § 750. Hence, it requires much

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less strength of case to defeat than to succeed in such an action. *Id.* § 769. In deciding whether relief shall be given or not, the court must not only scan the contract and the circumstances which led to it, but it must also consider the character and relation of the parties. The fact that the parties held confidential or trust relations at the time the contract was made, is sometimes decisive, of itself. The conduct of the parties must also be carefully examined. The party asking specific performance, to be entitled to relief, must always appear to have been honest and just in the transaction. Lord Redesdale, in *Harnett v. Yeilding*, 2 Sch. & Lef. 549, declared that the courts have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct. And Sir William Grant, master of the rolls, said, in *Cadman v. Horner*, 18 Ves. 10, that a party seeking specific performance, to entitle himself to relief, must be liable to no imputation in the transaction.

When the contract sought to be enforced was made, the subject of it, as well as the parties to it, were in this court. The complainant had possession of the subject of the contract, as the officer of this court. The court had taken possession of it for the purpose of protecting, defining and adjusting the rights of the parties to it, and, if necessary for the accomplishment of those ends, to sell and convey it. The contract was undoubtedly intended by the parties to supersede the action of the court in disposing of the partnership real estate, and for that reason should be regarded as a step in the settlement of the partnership affairs, then proceeding under the direction of the court. The \$30,000 required to be paid by the contract, was not to be paid to the complainant, but into court. The complainant had no right to the possession of the money, nor to control its disposition. The money was not due to him, nor payable to him, but was due to the partnership estate, and was to be paid into court, to be disposed of by its order in such manner as the interests of the partnership estate should require. At the time it became Mrs. Buckingham's duty to pay the \$30,000, it is important to understand what were the duties and obligations of the complainant to the partnership estate. He was not simply surviv-

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ing partner, but he stood charged also with the duties of receiver. He occupied a position where the law imposed upon him the duty of making the protection of the interests of the partnership estate his supreme object, and to sacrifice every personal interest that stood in the way of the faithful performance of that duty. When it became Mrs. Buckingham's duty to pay \$30,000 into the partnership estate, the complainant was already liable to that estate for over \$75,000. His debt represented partnership assets, and the court, in dealing with this matter, must treat him as though he, at that time, held in his hands funds belonging to the partnership to an amount exceeding \$75,000. He was bound to use this money in such manner as would best protect and promote the interests of the partnership estate. Unless it is assumed that the contract is a fair one, so just in all its parts that the court would have approved it had its approval been asked, the complainant has no right to be heard. If we make this assumption, it is clear that it was his duty to use the funds in his hands to help Mrs. Buckingham fulfill her contract. It is certain he could not stand still, with the money in his pocket, and let ruin overwhelm the estate. If it was required for the discharge of the partnership liabilities, he was bound so to apply it; if it was not, the half of it then belonged to Mrs. Buckingham, and he was bound to pay her in order to enable her to do what he now complains of her for not doing. There would be neither conscience nor honesty in a claim that he could unjustly withhold from her the means of fulfilling her contract, and still hold her liable for damages for its non-fulfillment. His duty to guard and protect the partnership estate, as well as his duty to protect a person holding to him the relation of *cestui que trust*, deprived him of the right to fold his arms and let her take care of herself. He was bound to help her to the extent of the means under his control. He does not pretend that he did this.

But is the complainant free from all responsibility for the losses of which he complains? It is not denied that the value of the firm's equity of redemption in the lands, which, by the contract, was estimated at \$30,000, has been lost. The lands have been sold for just sufficient to pay the mortgage debts.

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But is Mrs. Buckingham alone to blame for this result? She agreed, it is true, to procure releases to the firm of the debts for which the lands were sold, and failed to perform her agreement. But why did she fail? Was it not because the complainant unjustly neglected to apply the moneys in his hands, belonging to the partnership, to the benefit of the partnership, and stubbornly refused to extend to her the aid and assistance which good faith and fair dealing made it his duty to give? He had at that time over \$75,000 of the firm's money in his hands, and he has it still. Can there be any doubt that, had he applied it as his duty required him to do, Mrs. Buckingham would have performed her contract? While a delinquent himself in a sum so stupendous, he has no right to charge that the losses the partnership estate has sustained shall be attributed wholly to the delinquency of another, and that that other shall not only bear her own share of the loss, but his too.

The total debt of the firm at Mr. Horner's death, on all accounts, it is said, amounted to about \$130,000. The complainant's debt to the firm, at the same time, was over \$70,000. So that if he had performed his duty to the firm, it would have had the means of reducing its debt below \$60,000. On accepting the receivership, it was his duty at once to apply this sum in discharge of the obligations of the firm. It may be said it was not then ascertained, but it should have been. His position in the firm and his control over its accounts, made it his duty to have the books free from all obscurity as to the amount of his indebtedness. His failures in duty have, in a large degree, if not entirely, produced the consequences of which he now complains. His grievances are the result, in part, at least, of his own delinquency. This fact disentitles him to relief. His bill must be dismissed, with costs.



Besson v. Cox.

JOHN C. BESSON, executor &c., complainant,

v.

GEORGE COX et al.

1. A statute permitting a party to be a witness, although the other party sues or is sued in a representative capacity, applies to an action pending at the time of its passage.

2. In a suit for an account by a surviving partner against the executor of his deceased copartner, the survivor is competent to prove that the decedent applied partnership funds to his own use, but statements or personal transactions of the survivor with the decedent must be excluded.

The admissibility of testimony argued before Vice-Chancellor Dodd.

Mr. J. B. Vredenburg, for the admissibility.

Mr. J. D. Bedle, contra.

DODD, V. C.

George Cox and William Cox, brothers, being partners in

NOTE.—A statute allowing parties to testify who were incompetent when the cause of action arose, is constitutional, *Walthall v. Walthall*, 42 Ala. 450; *Ralston v. Lothair*, 18 Ind. 303; *West v. Creditors*, 1 La. Ann. 365; *Lemay v. Walker*, 62 Ala. 39; *Rich v. Flanders*, 39 N. H. 304; *Smyth v. Balch*, 40 N. H. 363; *Neass v. Mercer*, 15 Barb. 318.

Also, a statute prohibiting an interested party who was previously competent, from testifying, *Karney v. Paisley*, 13 Iowa 89; *Cannon v. Morris*, 81 N. C. 139; *Calderwood v. Calderwood*, 38 Vt. 171.

Statutes allowing parties to a suit to testify, apply to suits pending, *Rich v. Flanders*, 39 N. H. 304; *Van Valkenburgh v. Rahway Bank*, 3 Zab. 583; *Southwick v. Southwick*, 49 N. Y. 510; *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Westerman v. Westerman*, 25 Ohio St. 500; *John v. Bridgman*, 27 Ohio St. 22; *Eld v. Gorham*, 20 Conn. 8. See *Harrison v. Wisdom*, 7 Heisk. 99, 104; *Day v. McGinnis*, 1 Heisk. 310; *Crawford v. Halsted*, 20 Gratt. 211; *Kimball v. Baxter*, 27 Vt. 628.

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trade, the latter died, and his executor, the complainant in this suit, filed a bill for account against George, the surviving partner. It was referred to a master, to take and state the account, and on the hearing before him the surviving partner was offered on his own behalf as a witness to prove that the deceased partner had applied moneys of the firm to his own individual use, with which moneys the estate of the deceased should be charged. To support this averment a certain check purporting to be the check of the firm, signed with the firm name, and drawn payable to the order of Elizabeth Rowland, was shown to the witness and he was asked :

- (1) "Whose signature is to that check, and by whom was it written?"
- (2) "Did the firm of William and George Cox owe Elizabeth Rowland anything on January 12th, 1874 [date of check]?"
- (3) "What did Elizabeth Rowland give the firm of William and George Cox as a consideration for that check?"
- (4) "Whose money paid that check?"
- (5) "Was this money paid with your knowledge and consent?"
- (6) "Is there any entry on the books of the partnership of that payment except the book kept by the bank?"
- (7) "Had you authorized in any way William Cox to give that check to be paid out of the partnership funds?"

All the foregoing questions were objected to because one of the

Where the suit is against several co-defendants, of whom only one is dead, the surviving defendants are competent, if the contract was made with the living co-defendants, 1 *Whart. Erid.* § 469; *Bryan v. Tooke*, 60 *Ga.* 437. But see *Hogeboom v. Gibbs*, 83 *Pa. St.* 235; *Mason v. Wood*, 27 *Gratt.* 783; *Holmes v. Brooks*, 68 *Me.* 416.

So, where the suit is by several co-plaintiffs, under similar circumstances, *Bradley v. Patton*, 51 *Ala.* 108; *Chisholm v. Turner*, 36 *Ga.* 565; *Runkel v. Phillips*, 9 *Phila.* 619; *Hardy v. Chesapeake Bank*, 51 *Md.* 562; *Ward v. Bowen*, 14 *Wis.* 405; *Read v. Stuterant*, 40 *Vt.* 521.

The other party, in such cases, is also competent, *Bragg v. Clark*, 50 *Ala.* 363; *Moore v. Harlan*, 37 *Ga.* 623; *Rauzon v. Cherry*, 44 *Ga.* 73; *Hall v. State*, 39 *Ind.* 301; *Dodds v. Rogers*, 68 *Ind.* 110; *McCutchen v. Rice*, 56 *Miss.* 455; *Fulherson v. Thornton*, 68 *Mo.* 468; *Roberts v. Yarburo*, 41 *Tex.* 449; *Tremper v. Allen*, 44 *N. Y.* 58; *Fuler v. Jordan*, 44 *Miss.* 283; *Brown v. Allen*, 35 *Ind.* 101; *Comstock v. Hier*, 73 *N. Y.* 269; *Wren*, 61 *Ga.* 189. See *Brady v. Reed*, 87 *Pa. St.* 111.

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parties to the suit was in a representative capacity, and the opposite party was therefore excluded from offering himself as a witness on his own behalf. In answer to this objection the defendant relied upon the supplement to an act concerning evidence approved February 25th, 1880, (*P. L. of 1880 p. 52*). The counsel of complainant contended, first, that this supplement did not apply, for the reason that the present suit was pending before its passage; and second, that if the supplement did apply to the present suit, the questions were inadmissible, because they called for testimony as to a transaction with or statement by the testator represented in the suit.

I am of opinion that the supplement applies to suits pending at the time of its passage as well as to suits subsequently commenced.

I am also of opinion that all the questions are competent and admissible, except the two questions numbered *five* and *seven*. There maining questions do not involve any personal intercourse between the witness and the deceased in his lifetime, and are not within the scope of the just and fair rule which shuts the mouth of the surviving one of two parties as to what was done or said in a transaction or talk between him and the deceased. The wrong of permitting one of such two parties to testify when the other cannot speak, is what the statutory exclusion is aimed at. In none of the above questions is the witness asked to speak of any transaction or statement of the deceased with or to himself,

But evidence as to transactions with or by such deceased coparty, is inadmissible, *Alabama Gold Ins. Co. v. Sledge*, 62 Ala. 566; *Long v. McDonald*, 39 Ga. 186; *Hook v. Bixby*, 13 Kan. 164; *Romer v. Jaecksch*, 39 Md. 585; *Hanna v. Way*, 77 Pa. St. 27; *Baxter v. Leith*, 28 Ohio St. 84; *Standbridge v. Catawach*, 83 Pa. St. 368; *Williams v. Barrett*, 52 Iowa 637; *Hannon v. Dart*, 37 Mich. 53; *Central R. R. v. Papot*, 59 Ga. 342; *Ford v. Kennedy*, 64 Ga. 537. See *Carlton v. Mays*, 8 W. Va. 245; *Niccolls v. Esterl.*, 16 Kan. 32; *Kale v. Elliott*, 18 Hun 198; *Pettit v. Geesler*, 58 How. Pr. 195; *Freeman v. Ross*, 15 Ga. 252; *Crane v. Gloster*, 13 Nev. 279.

In a suit by a surviving partner against the representatives of his deceased copartner, he is not competent to testify as to any transactions with his deceased copartner, *Porter v. White*, 39 Md. 613; *McKaig v. Hebb*, 42 Md. 227; *Graham v. Howell*, 50 Ga. 203; *Faler v. Jordan*, 44 Miss. 283.

Although competent as to other transactions, *Hayward v. French*, 12 Gray 453; *Love v. Cummings*, 10 Bush 578.—REP.

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unless it may be in the fifth and seventh. As these two last-named questions stand, I think they are objectionable. The latter is more clearly so than the former. If the consent or authority inquired about in these two interrogatories can be supposed to have been a consent or authority given directly to the bank to pay the check, or to Elizabeth Rowland to go and get the check, the questions should have been framed so as to exclude the idea which I think they now involve, that the consent or authority was given between the witness and the deceased when alive.

The above views as to the competency of the questions are supported by the case of *Clawson v. Riley*, 7 Stew. Eq. 348, recently decided by the chancellor.

 CHARLES V. MOORE.

v.

WILLIAM T. ROE and SUSAN ROE.

The transfer of all a debtor's property pending a suit against him; the taking of an absolute deed as security for money owing by the debtor, and looseness or incorrectness in stating the consideration of the conveyance, in determining the value of the property conveyed, are indications of fraud.

Argued on the pleadings and proofs, before Vice-Chancellor Dodd.

Mr. Charles D. Thompson, for complainant.

Mr. Shepherd, for defendants.

DODD, V. C.

The bill in this case is filed by a judgment creditor to ~~en~~ side a conveyance made by his debtor, the defendant, to ~~h~~

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mother, during the pendency of the action in which the judgment was recovered.

The defendant, William T. Roe, was, on the 24th of May, 1880, seized of a farm of about ninety-two acres, in the township of Stillwater, county of Sussex, which by deed of that date he conveyed to Susan Roe, his mother, and co-defendant. The complainant, Charles V. Moore, a practising physician, brought an action of *assumpsit* against William T. Roe, on the 1st of that month, in the circuit court of Sussex, and on the 14th of July following, obtained a judgment for \$434.29 damages and costs. A *fi. fa. de bonis et terris* to the sheriff was returned that he could find no goods, and that he had levied on the above lands.

The bill alleges that the conveyance was made without consideration, or, if with consideration, that it was intended to hinder and delay him in the collection of his debt, and should therefore be adjudged void as to him, and prays that it may be so decreed.

I am of opinion that the complainant is entitled to the relief which he asks for. It seems to me clear, from the evidence, that, while not without any consideration, the consideration was inadequate, and further, that if adequate to the value of the premises conveyed, the intention of the parties to it was to hinder and delay the complainant in collecting his debt.

The defendant, Susan Roe, to whom the conveyance was made, was a widow of advanced age, having several married children, and possessed of pecuniary means amounting to \$10,000 or \$12,000. She had let each of them have moneys which seem to have been regarded as advances, on which only the interest was expected to be paid. The defendant, William T. Roe, had received different sums at various times, for which his mother, at the date of the conveyance, held his promissory notes. Other sums besides those named in the notes are alleged to have been owing, but how much does not accurately appear.

On the 14th of May, 1880, Mr. Thompson, the complainant's attorney, served a copy of the declaration in the action which was begun on the first of the month, on the defendant therein,

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who said to him, "Go ahead; I guess you won't get much," or words to that effect. The conveyance, which was made ten days afterwards, was absolute, and conveyed all the property the defendant owned. The consideration named in it was \$2,000, and, in addition, the premises were conveyed subject to a mortgage for \$1,450, with accrued interest from April 1st, 1869. It clearly appears that this deed was made at the suggestion of William. There was no desire or offer on her side to buy. There were wanting the essential elements and features of a *bona fide* sale. It is evident that the premises would not have been conveyed to her but for the expected judgment of Dr. Moore. She testifies that she knew that he was pressing for his claim, and that William offered to give her a deed. When asked if she did not know that Dr. Moore could not sell the farm if she held the title, she answered that she did not want him to; that she wanted to get hers. When asked if she took the farm to prevent Dr. Moore from getting his claim, she answered that she took it to get hers.

When the conveyance was made, the true amount of William's indebtedness to his mother was not ascertained, as in a genuine bargain it would have been; nor was the price or value of the farm considered and settled, as it would have been if the transaction had been in reality what it purported to be. The indebtedness was arrived at in a proximate way. The answer says it was *about* \$2,000. I think it was considerably less. The mother testifies that, "it might have been \$1,400, \$1,500 or \$1,600; it might have been more; it might have been less." The son testifies that when he made the conveyance, the sums he owed his mother aggregated *about* \$2,000, as they summed them up. The farm appears to have been worth, in the market, not far from \$4,000. The witnesses differ as to its value.

The transaction cannot, I think, be reasonably taken to have been a *bona fide* sale and purchase. It is, in fact, but feebly insisted on as anything more than a mode of securing to the mother the payment of her alleged claim. Regarded in that light, it was, under the circumstances, illegal and unfair. If no intention had been entertained to hinder or delay the com-

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plainant, the mother's claim, if just, would naturally and properly have been secured by a mortgage giving her a prior lien on the land to the extent of her debt, and leaving the balance of the son's estate therein to be resorted to by his creditors. The course actually taken was a deceptive and embarrassing one, calculated to mislead and impede the creditor, who was known to both parties to the deed to be prosecuting his claim.

It is not difficult for parties taking such a course to deny the existence of an intention to hinder, delay or defraud, and so far to persuade themselves that their only purpose was to secure a debt due the grantee, as to make their denial without willful perjury, but the unavoidable inferences from their acts will countervail their denial.

In *Bump on Fraud. Con.*, the transfer of *all* the debtor's property is declared a badge of fraud; so, also, the existence of indebtedness and the pendency of a suit; also, the taking of an absolute deed as security for money, for it is calculated to make creditors believe that no part of the property is subject to their demands, when, in fact, it is otherwise; also, the circumstances of looseness or incorrectness in stating the consideration of the conveyance, or in determining the value of the property conveyed. *Bump on Fraud. Con.*, ch. 3, 4; *Garr v. Hill*, 1 *Stock*. 210; *Knight v. Packer*, 1 *Beas*. 214; *Sayre v. Fredericks*, 1 *C. E. Gr.* 205; *Tantum v. Green*, 6 *C. E. Gr.* 364.

Considering all the facts and circumstances of this case, I cannot doubt that the conveyance in controversy was devised and intended to delay and hinder the collection of the complainant's debt, and must therefore advise a decree accordingly.

Comins v. Culver.

REUBEN COMINS and JONATHAN W. POTTLE

v.

ALMENA M. CULVER et al.

The firm of Culver & Hetfield became indebted in 1868, to Comins, who began suit thereon in the supreme court of New York in 1872. Culver died in 1875, pending the suit, which was continued against Hetfield, and a judgment for \$13,000 recovered in March, 1876. An appeal therefrom was taken, and one of the complainants in this suit, Pottle, became surety on the appeal at the request of the heirs and representatives of Culver. The judgment below was affirmed on the appeal. Hetfield paid \$2,000 on the judgment in March, 1881, and Pottle, after suit and judgment against him thereon, \$10,000. During Culver's lifetime, Hetfield & Culver dissolved partnership and divided the assets, leaving Comins's claim unprovided for. Hetfield is insolvent. On demurrer to a bill by Comins and Pottle against Hetfield and the heirs and representatives of Culver—*Held*,

(1) That their claim against Culver's estate was not barred by the statute of limitations, nor lost by laches.

(2) That as Pottle paid part of the debt of Culver & Hetfield to Comins, he thereby became subrogated *pro tanto* to Comins's claim, and was therefore properly joined as a complainant with Comins.

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On bill and demurrer.

Messrs. Collins & Corbin, for complainants.

Mr. Peter Bentley, Jr., for defendants.

The bill is filed by the complainants for themselves and other unsatisfied creditors of the late firm of Culver & Hetfield, and sets out the following facts: Samuel A. Hetfield, one of the defendants, and Isaac B. Culver (now deceased), as partners in constructing a railroad, incurred a debt in 1868 to Reuben Comins, who commenced suit for it in the New York supreme court in the year 1872. Pending the suit, and in the year 1875, Culver died. The suit was continued against the surviving defendant, Hetfield, and judgment was given for Comins, March

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17th, 1876, for \$13,691.27. This judgment was affirmed on appeal, and by the affirmance the complainant Pottle, who had given security on the appeal, became liable to pay the judgment. There was realized on the judgment out of the property of Hetfield, March 19th, 1881, the sum of \$2,675.67. Pottle has paid (after suit and judgment against him) on his liability \$10,034.87, and claims an interest in the judgment to that extent, Comins retaining the residue. Hetfield is insolvent. This suit is brought by Comins and Pottle to recover the amount still due on the judgment from the estate of Culver. The defendants are the heirs-at-law of Isaac B. Culver, deceased, Almena M. Culver, the administratrix, and Samuel A. Hetfield, the surviving partner. There are personal assets undistributed in the hands of the administratrix, whose final account has been filed but not allowed. The heirs have conveyed lands of the estate to their mother, Almena M. Culver, as is charged, in fraud of creditors. The administratrix and heirs employed counsel in the New York suit, and complainant Pottle became surety on appeal at their request. The partnership between Culver and Hetfield was settled in the lifetime of Culver, and an equal division of assets was made, leaving the claim of Comins unprovided for. The prayer is that the fraudulent conveyances may be set aside and the complainants' debt paid out of the assets, real and personal.

The defendants (except Hetfield) have filed a general demurrer, and also demur specially for misjoinder of complainants.

Dodd, V. C.

The argument in support of the general demurrer was on the ground that the bill shows a cause of action barred by the statute of limitations. The special demurrer was on the ground that the two complainants were improperly joined. I am of opinion that both demurrers must be overruled.

The rule is settled that the creditor of a partnership may, at his option, proceed at law against the surviving partner or go in the first instance into equity against the representatives of

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the deceased partner. *Story on Part. 362; Nelson v. Hill, 5 How. 127.*

In the present case, an action at law was begun by Reuben Comins in the year 1872, in the supreme court of New York, against the partners, Culver and Hetfield. It was contested, and in November, 1875, before judgment, Culver died. By his death the equitable right of suit against his representatives arose. This equitable claim is now sought to be enforced by bill filed within six years from the time when the right accrued. At the time of Culver's death, in November, 1875, more than six years had elapsed since the legal right of action had accrued, which was in 1868, when the partnership debt was contracted. Did the delay made by the resistance of the partners in the legal action till the death of Culver, terminate all right of recourse by Comins to Culver's individual estate? I can find no grounds of principle or authority on which this question can be answered in the affirmative. If his death, after the six years, did not absolve his individual estate from all liability to Comins, and the equitable right thereupon arose, how long did such equitable right continue? It was contended by the counsel of the complainants that the real question in this suit in equity, is not whether the debt is barred by the statute of limitations, but whether there has been such laches on the part of the complainant, since the death of Culver, as to require this court to dismiss the present bill. I think this contention a good one.

After the legal action in New York abated against Culver by his death, it was continued against Hetfield, the surviving partner, and was defended by counsel employed by the heirs and administratrix of Culver. The legal remedy was pursued against Hetfield, and not exhausted till March 19th, 1881, when his property was taken under and in part satisfaction of the judgment. The present suit was commenced shortly afterwards. No laches can therefore be alleged, and no complaint can be made of delay by parties defendant, who have caused the delay by vexatious and protracted litigation.

In *Graves v. Coutant, 4 Stew. Eq. 763*, the court of appeals held that a vendor's lien more than twenty years old, had been

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kept alive by a suit resulting in judgment, in New York, against the vendee, so that the vendor's lien could be enforced in equity against the wife of the vendee, to whom he had conveyed the lands more than sixteen years before the bill was filed.

There is another ground on which the bill may be sustained as against the statute of limitations. Complainants' claim against Hetfield is not outlawed, and Hetfield has a remedy over against the estate of his deceased partner for contribution, which is not outlawed. The complainants' bill will lie to enforce that remedy. In *Peaslee v. Breed*, 10 N. H. 489, it was held that where the liability of one contractor was continued by partial payments, the debtor, who kept the demand alive and paid it after six years, might recover at law a contribution from the other within six years after the final payment. In *Hammond v. Hammond*, 20 Ga. 556, the court held that an accounting between partners is not barred so long as debts are due to or from the partnership. In *Robinson v. Alexander*, 2 Cl. & Fin. 717, an accounting was ordered after twenty years, between the representatives of joint owners of a vessel, on the ground that such case was within the spirit of that exception to the statute which relates to accounts between merchant and merchant. In *Partridge v. Wells*, 3 Stew. Eq. 176, affirmed 4 Stew. Eq. 362, a bill was filed by a surviving partner against the widow of a deceased partner to reach lands which the deceased partner had bought in his wife's name, more than six years before, with partnership funds. This bill was sustained on the ground that there was no adequate remedy at law, and the statute of limitations did not apply to a claim of exclusively equitable cognizance. If in that case a creditor of the partnership had filed a bill for the same relief, it is not easy to see on what principle he could be barred, so long as his claim was valid against the survivor. The survivor's claim against the estate of his deceased partner is an asset, which the judgment creditor of the survivor can seek by bill in equity, as he can any other chose in action of his judgment debtor. Complainants' bill alleges that all the partnership assets were equally divided between the partners, leaving complainants' debt unprovided for. Hetfield has a claim against

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the estate of Culver for contribution and for protection as to half of complainants' judgment. To avoid circuitry of action, the complainants may enforce the remedy which Hetfield has in equity against the estate of his deceased partner. *Winter v. Innes*, 4 Myl. & Cr. 101; *Brathwaite v. Britain*, 1 Keen 206; *Way v. Bassett*, 5 Hare 55.

The objection that the complainant Pottle is improperly joined with Comins, is not a good one. He became a surety for the defendants Culver and Hetfield in the action at law, and was obliged to pay a portion of their debt. He became subrogated to that extent to Comins's claim. He is an equitable owner of a part of the debt sought to be recovered, and should be joined with the other owner in this equitable suit. 1 Dan. Ch. Pr. 192. At the hearing an application was made by complainants to amend their bill, which was granted, without costs. I will therefore disallow costs against defendants on overruling their demurrers.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1882.

THEODORE RUNYON, ESQ., ORDINARY

In the matter of the propounding for probate of a paper writing purporting to be the last will and testament of JOSEPH L. LEWIS, deceased, late of Hoboken.

A claim for services rendered by a detective employed by the counsel of the principal legatee, such services being valuable in establishing the will, may be allowed and paid out of the estate.

Mr. Jos. Coult, for Lowell & Britton.

Mr. Cortlandt Parker, for the executors.

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Samuel J. Lowell and George F. Britton present a claim for detective services rendered in this cause from November, 1878, to February, 1880, on the part of the proponents. The claimants were employed by the counsel for the United States, the principal legatee under the will, who certify that considering the labor and skill expended, and the results accomplished, the executors would be fully justified in paying a sum which they name for the services. The services appear to have been of great value, and they were rendered in establishing the will, and on the employment of counsel appearing for the principal legatee. The bill, if duly verified, should be allowed as part of the expenses of the litigation, and the executors will be ordered to pay the amount certified to by the counsel of the government on the claimants making oath that the services charged in the bill were rendered.



CHARLES J. WILLIAMS, appellant,

v.

ELIZABETH WILLIAMS, respondent.

A testator gave \$5,500 out of his bonds and mortgages for the support of his daughter, and directed the trustee (his son) to keep the money invested, and to pay her the interest, and so much of the principal, as might be needed for her support. The trustee bought a house with the money, and accounted only for the rents derived therefrom, which were less than the fund would have produced if invested at legal interest.—*Held*, that he must also account for the difference between the rents received by him from the house, and legal interest on \$5,500.

Appeal from order of Essex orphans court.*Mr. G. F. Tuttle*, for appellant.*Mr. Boggs*, for respondent.

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THE ORDINARY.

The appellant brings before this court for review an order of the Essex orphans court, made on his accounting before it as trustee under his father's will. He objects to all the surcharges made against him therein. The order requires him to account for interest at the legal rate upon a fund of \$5,500, which, by the will, he was directed to invest, and keep invested, for the benefit of his sister Elizabeth, for her life, and which he converted into real estate in 1879, and for the net rents whereof only, amounting to less than legal interest on the fund, he has accounted since that time, and it charges him with the money received by him from the sale of certain articles of household furniture, specifically given to her by the will, and which he has sold; and it directs that, in his charges for her support, he be allowed only the amounts actually paid by him, either by the appropriation of rents or otherwise. He also objects to the requirements of the order that he pay the costs of the accounting out of his private estate, and that a counsel fee of \$75 be paid out of the fund to the counsel of the exceptant, his sister Elizabeth. His objection to the counsel fee is that it is too large in amount.

The third clause of the will is as follows :

"I give and bequeath unto my son, Charles J. Williams, Jr., as guardian of my daughter Elizabeth, \$5,000 from my bonds and mortgages, for her support and maintenance, and authorize and empower him to re-invest and keep invested the same, and pay the interest arising therefrom to her during her natural life; and in case the said interest should not be necessary [sufficient] for her comfortable support, I hereby authorize him to pay her, from time to time, such sum or sums as in his judgment she may require, from the principal. In case my daughter Elizabeth should die leaving no issue, I give and bequeath to my son Charles the sum of \$500 out of the said sum of \$5,000, or the remainder thereof, to be his—heirs and assigns, forever; and the remainder I give and bequeath to my two sons, Charles J. Williams and William H. Williams, to be equally divided between them, share and share alike. But if my said daughter Elizabeth should marry and have children, heirs of her body, I then and in that case give and bequeath the said sum of \$5,000, or what shall remain thereof, to her children, to them, their heirs and assigns, forever."

By a codicil, he provided as follows :

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"In case my bonds and mortgages are insufficient to pay the above legacy of \$5,000 to my said daughter Elizabeth, I hereby authorize and order my executors to take any other personal property of which I may die seized; and if there should not be personal property sufficient, then I order and authorize my said executors to sell as much of my real estate as to make the said sum of \$5,000 and to pay the same over to her guardian above named, to be invested by him to the best advantage for her support, as above stated. I hereby give and bequeath to my said daughter Elizabeth, in addition to the above sum, the further sum of \$500, to be paid to my son, Charles J. Williams, Jr., as guardian, to be invested by him for her benefit, as above stated."

He appointed Charles and William executors, and they both proved the will and assumed the executorship. The \$5,500 were received by the appellant in January, 1871, partly in seven per cent. bonds and mortgages, and partly in a savings bank deposit producing like interest. It appears that in April, 1872, Charles and William bought a house and lot in Newark, for which they paid \$4,900, borrowing \$2,900 of the trust funds to enable them to make the payment. For the money so borrowed a seven per cent. mortgage was given by them to Charles as guardian of Elizabeth. They subsequently spent \$300 on the property, and in 1879 conveyed it on the trust hereinafter mentioned to Charles, for the consideration of \$5,200. He says that after this latter conveyance he spent \$300 of the trust funds upon the property. The deed to him was on the following trust declared therein:

"To collect and receive the rents, issues and profits thereof, and out of the same to pay the taxes and all the other legal charges upon said premises from time to time, and all expenses for necessary repairs and reasonable insurance upon the same, and, in the next place, to pay the remainder of said rents, issues and profits, or so much thereof as may be necessary, to and for the support of Elizabeth Williams, the sister of the parties hereto, during her natural life, or until said premises shall be sold and conveyed; and upon the further trust to sell and convey said premises at any time when said Charles J. Williams shall think best to do so; and upon any such sale being made, or upon the decease of said Elizabeth, then to dispose of the proceeds of any sale, if the same shall be made, or of the said premises hereby conveyed, according to the trusts and directions contained in the third clause of the last will of Charles J. Williams, deceased, the father of the said Charles J. Williams and William H. Williams."

The trustee testifies that he and his brother bought the prop-

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erty for an investment for themselves, and when asked how "he came to change it to an investment for the estate," answered that he had borrowed some of the money from the estate to use in another way, and the financial panic came on, and to secure the estate he and his brother conveyed the property to him as guardian. The net rents of the property appear to have been only about from three to four per cent. per annum. Elizabeth did not consent to the investment. She is, in fact, a person of weak mind, incapable of consenting. The trustee had no right to invest the fund in real property without the direction of a competent court. *Eckford v. De Kay*, 8 Paige 89; *Perry on Trusts* § 458. In the absence of such direction, it was clearly his duty to invest on such securities as are recognized by this court and the court of chancery as proper for the investment of trust funds. They are securities of the United States and of this state, and mortgages of real estate. *Lathrop v. Smalley*, 8 C. E. Gr. 192; *Tucker v. Tucker*, 6 Stew. Eq. 235. It is manifest, from the language of the will, it may be remarked, that the testator intended that the fund should be invested, and kept invested, on interest-producing securities; and it is also clear that the investment in the land would not have been made, had it not been deemed necessary in order to protect the fund against the loss from the illegal act of the trustee in using part of it for his own purposes. It is urged that so long as Elizabeth receives her support out of the income of the fund she has no right to complain. But obviously that position cannot be maintained. It is her right to have the fund duly invested, and to have the surplus interest, if any, added to the fund for her benefit, in case of need; and the trustee is bound to account accordingly. He is chargeable with legal interest on the fund during the time it was invested in the land. Due allowance should be made him with respect to any reasonable period of time before the purchase of the land during which the funds were in his hands awaiting an opportunity for investment. There is no satisfactory evidence on that head, however. It appears that she boarded with William, and that when the income from the property proved insufficient to pay for her support, William and Charles supplied

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the deficiency out of their own funds ; that is, each bore one-half of it.

By the will the testator gives certain household furniture to Elizabeth, and directs that, if there should be more of it than she should require, Charles sell the surplus, with her consent, and invest the proceeds for her benefit. The trustee should have charged himself with the proceeds of the sale of furniture, and claimed credit for the furniture purchased therewith. If he did not use all the money in the purchase of new furniture for his sister, he is chargeable with the balance. He testifies, however, that he sold the furniture because it was old, and bought new in its place for Elizabeth to quite the same amount. As to the charges for support of Elizabeth, inasmuch as the trustee is chargeable with interest on the fund at the legal rate, he should be allowed reasonable payments for her support ; and they should not, under the circumstances, be confined to the money actually paid to his brother therefor. It appears, as before stated, that the deficiency in income for her support was met by him and his brother, each bearing an equal share thereof. It is but just to allow him the full amount in the restatement of the account, seeing that he is to be charged with legal interest on the fund. Under the circumstances, the action of the court in charging him with the costs, is right, and the amount of counsel fee awarded is not excessive.

The result is, that the order appealed from is sustained as to the charge of interest and as to the costs and counsel fee, and is reversed as to the charge for the proceeds of the sale of the furniture and the allowance to be made for support. No costs of the appeal will be awarded to either side.

Walling's Case.

In the matter of the assessment of damages on the bond given by JOHN L. WALLING, as guardian of three of his minor children:

1. A ward, whose estate was small, lived with his father, who was the guardian. The father never, during his lifetime, made any charge against the ward for his maintenance.—*Held*, that sureties of the guardian cannot obtain an allowance therefor in a suit on their bond.

2. A guardian was appointed in 1860; his youngest ward came of age in 1871, and the guardian became insolvent in 1872 or 1873.—*Held*, that the ward's omission to sue the surety or his administrator, until 1880, did not prevent his recovery.

Mr. D. H. Applegate, for the wards.

Mr. G. C. Beekman, for administrators of surety.

THE ORDINARY.

In 1860, John L. Walling was appointed by the orphans court

NOTE.—A guardian may expressly agree not to charge anything for the support of his ward, *Manning v. Baker*, 8 Md. 44; *Bradford v. Bodfish*, 39 Iowa 681; *Hooper v. Royster*, 1 Munf. 119. But see *Keith v. Miles*, 39 Miss. 442; *Armstrong v. Walkup*, 9 Gratt. 372, 12 Gratt. 608.

A gratuitous remark by a guardian, that he would not charge his ward for board, is not obligatory on him, *Cunningham v. Pool*, 9 Ala. 615; *Alsop v. Barbee*, 14 B. Mon. 526.

If a child has been supported without any expectation of charging therefor no recovery can be obtained by the adult afterwards changing his intention, *Folger v. Heidel*, 60 Mo. 285; *Dow v. Whipple*, 2 Mass. 418; *Crosby v. Crosby*, 1 Rich. (N.S.) 337; *Evans v. Pearce*, 15 Gratt. 513; *Webster v. Wadsworth*, 44 Ind. 283; *Chapline v. Moore*, 7 Mon. 163. See *Bond v. Lockwood*, 33 Ill. 212; *Harland's Accounts*, 5 Rawle 323.

If a guardian of minors loans money to their mother on her promising him to charge them for their support, and to give him the benefit of such charges, which she afterwards refuses to do, he can obtain no allowance therefor, *Wykoff v. Hulse*, 5 Stew. Eq. 697.

If a child sues the administrator of its mother for money received by her, in her lifetime, as guardian, the administrator cannot set up a claim for maintenance, when there is no evidence that the mother ever intended to charge therefor, *Guion v. Guion*, 16 Mo. 48; *Cummins v. Cummins*, 8 Watts 366; *Presley v. Davis*, 7 Rich. Eq. 195; *Edwards v. Durgen*, 19 Grant's Ch. 101;

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of Middlesex county guardian of three of his minor children, and gave bond with David Hult, now deceased, as surety. The youngest of the children came of age in the fall of 1871. The guardian became insolvent about 1872 or 1873. In 1880, on the application of the wards, suit was brought on the bond in the name of the ordinary, and judgment recovered for the amount of the penalty. The administrators of the surety insist that the support of the wards during minority should be allowed in estimating the damages. The estate of each of the wards was only about \$216. The guardian, their father, was able to maintain them during all the period of their wardship, and it was his duty to do so. He would be entitled to no allowance therefor, under the circumstances, at law. Nor would he be in equity, for it is a settled principle of the court of chancery not to allow maintenance on behalf of infants out of their property unless it will be for their benefit to order an allowance. And it is not for their benefit to direct an allowance out of their general estate, where they have any other sufficient provision for their maintenance, or a right which can be enforced to demand it from

Martin v. Foster, 38 Ala. 688. See *Ambler v. Macon*, 4 Cal. 605; *Brazill v. Brazill*, 11 Grant's Ch. 253; *Petit's Appeal*, 39 Pa. St. 324.

Where the wards are invited by their guardian to live with him gratuitously, neither his administrator nor his bondsman can afterwards set up a claim for their maintenance, *McDowell v. Caldwell*, 2 McCord's Ch. 43.

Where children were educated by their father, who is also their guardian, and he had ample means then to educate them, but became insolvent afterwards, his assignee cannot present a claim against them or their estate for the cost of their education, *Walker v. Crowder*, 2 Ired. Eq. 478.

Where a father is also guardian of his son, and makes no charge for tuition or support, his surety, in a suit on the guardianship bond, can make none, *Pratt v. McJunkin*, 4 Rich. 5; *Myers v. Appleton*, 45 Ind. 160. See *State v. Clark*, 16 Ind. 97; *Fuselier v. Babineau*, 11 La. An. 393; *State v. Hull*, 53 Miss. 626.

A father, who was also guardian of his two children, maintained and educated them at his own expense, and made no charge therefor. At the time of his death his estate was ample to satisfy all of his liabilities, but it became insolvent afterwards.—Held, that one of his creditors could not charge against the children or their estate, the moneys expended for them by their father, *Griffith v. Bird*, 22 Gratt. 73; *Humphrey v. Humphrey*, 79 N. C. 396. But see *Alsop v. Barbee*, 14 B. Mon. 522.

Where a stepfather was appointed guardian, and had maintained his wards

Walling's Case.

her sources. The court, therefore, will not direct an allowance to the father of the infants out of their estate, where he is of sufficient ability to maintain and bring them up without it in reference to their situation and prospects in life, having a due regard to the claims of others upon his bounty. *Matter of Kane*, Barb. Ch. 375.

In the case in hand the father makes no charge for maintenance, and never intended to make any, but the claim is made on behalf of the surety's estate. There is no ground for allowing it.

Further, the administrators insist that the surety's estate is discharged by reason of the failure of the wards for so long a time after they came of age to prosecute their father for the money due them. But the mere omission to prosecute the principal will not discharge the surety. There should be execution for the amount of the money received by the guardian, with interest, crediting the payments proved.

in his family before his appointment, neither he nor his sureties can, in an action on their bond, set up a release given by the ward's husband for property of the ward sold by the guardian, the proceeds of which he claimed had been expended for her support, and for which the release had been given, *Barnes v. Ward*, Busb. Eq. 93. See *Freeman v. Tucker*, 20 Ga. 6.

Sureties cannot be held liable for the value of services rendered by the ward to the guardian, but if the guardian has charged the ward for support &c., and not credited him with the value of his services, the sureties are liable for the amount of such improper items, *Phillips v. Davis*, 2 Sneed 520. See *Armstrong v. Walkup*, 12 Gratt. 608.

What proofs are necessary to establish a claim for the past maintenance of a ward, where no claim was asserted at the time, *Reeves v. Brymer*, 6 Ves. 425; *Anderson v. Partington*, 3 Bro. C. C. 60; *Bruin v. Knott*, 1 Phill. 572; *Stopford v. Canterbury*, 11 Sim. 82; *Bond's Case*, 2 Myl. & K. 439; *Sherwood v. Smith*, 6 Ves. 454; *Maberly v. Turton*, 14 Ves. 499; *Carmichael v. Hughes*, 6 E. L. & E. 71; *Darlington's Case*, 1 Ball & B. 240; *Fielder v. O'Hara*, 16 Grant's Ch. 610; *Welch v. Burris*, 29 Iowa 186; *Otte v. Becton*, 55 Mo. 99; *Kane's Case*, 2 Barb. Ch. 375; *Riddle v. Riddle*, 5 Rich. Eq. 31; *Smith v. Geortner*, 40 How. Pr. 185; *Brandon v. Brandon*, 4 T. & C. (N. Y.) 385; *Swift v. Swift*, 40 Cal. 456, 47 Cal. 629; *Rolfe v. Rolfe*, 15 Ga. 451, 20 Ga. 325; *Ponder v. Foster*, 23 Ga. 489; *Cook v. Rainey*, 61 Ga. 452; *Janet v. Andrews*, 7 Bush 312; *State v. Cook*, 12 Ired. 67.—REP.

Conover's Case.

In the matter of the assessment of damages upon the bond given by DANIEL CONOVER, as guardian of Charles Schanck, a minor.

The sureties of a guardian who are released by virtue of an application for relief under the one hundred and twenty-fourth section of the orphans court act, while they are, on the giving of new sureties by the guardian, released from liability for the subsequent acts, defaults and misconduct of their principal, are in no wise discharged from liability for his acts, default or misconduct precedent thereto. Therefore, where a guardian had wasted the estate before the giving of new sureties pursuant to the application of the original ones, the latter were held liable, notwithstanding the demand for the wasted funds was not made until after the new sureties had been given.

On exceptions to report of A. R. Throckmorton, esq., surrogate of Monmouth county, to whom it was referred to ascertain and report damages. Submitted on briefs of counsel.

Mr. C. Robbins, for surviving surety.

Mr. W. H. Vredenburg, for ward.

THE ORDINARY.

Daniel Conover was appointed guardian of Charles Schanck, a minor, then under fourteen years of age, May 27th, 1867. He gave bond in the penalty of \$4,000, with Hendrick P. Conover and Stacy P. Conover as his sureties. Of the minor's estate he received as guardian in 1867 and 1868, \$4,692.19. On the 27th of May, 1877, the orphans court of Monmouth county, under the one hundred and twenty-fourth section of the orphans court act, on the petition of Stacy P. Conover and the executors of Hendrick P. Conover (who was then dead), by its order released the sureties from liability on the bond for any subsequent act, default or misconduct of the guardian, and the guardian gave a new bond with other sureties. By the guardian's account, then filed and settled, there appeared to be then due from him to the

Conover's Case.

ward a balance of \$4,242.82. The surrogate finds that the balance was, in fact, \$5,298.57. On the same day on which the sureties were released, the orphans court, on the petition of the guardian, who thereby represented that he had \$2,133.15 of the money of the minor in his hands to invest, and prayed direction in the premises, directed him to invest that money on his own bond, to be given to a trustee for the minor, and to be secured by a mortgage on his farm (on which there were previous encumbrances stated in the petition), with an assignment of a policy of insurance against fire, as collateral; and he gave the bond and mortgage, and made the assignment accordingly. Of the ward's money, he had about two years previously expended, without authority, \$2,000 in paying off a mortgage held by Isaac G. Smock on the farm. He had, however, kept that mortgage alive by causing it to be assigned to the minor, and at the request of the surviving surety on the guardian's bond and the executors of the other, he had, as guardian, assigned it to a trustee for them for their indemnity against loss by reason of liability on that bond. After the ward came of age suit was brought in the name of the ordinary on the bond, against the guardian and the surviving surety, and a judgment recovered therein December 13th, 1880, for the amount of the penalty, \$4,000. A reference was subsequently made in this court to the surrogate of Monmouth county, to ascertain and report the amount of damages sustained by the ward. He reports the amount due at the date of the judgment on the bond at \$3,877.17, and the report is brought before me on exceptions filed by the ward and the surviving surety, respectively. One of the breaches assigned in the suit on the bond was non-payment of the money due the ward on demand made after he came of age. The liability of the sureties on the bond is limited to the acts, default or misconduct of the guardian prior to May 21st, 1877, the date of the before-mentioned order of release. There was at that date due from the guardian to the ward the sum of \$5,298.57. Of this amount \$2,133.15 were invested under the order of that date, and \$2,000 had been previously (it was in May, 1875) expended in paying off the Smock mortgage. The surviving surety insists

Conover's Case.

that both of these sums should be allowed as investments properly made on account of the ward.

It is clear that when the guardian employed the money of the ward, without any authority whatever, in paying off a mortgage on his own farm, he was guilty of a *devastavit* to that extent. And though he kept the mortgage on foot, and caused it to be assigned to the ward, he afterwards assigned it away to his sureties for their indemnity against liability on his bond, and they still hold it. He never regarded it as an investment of the ward's money, and if he had done so, he assigned it away. Obviously, there should be no allowance for the money expended in paying off that mortgage. As to the other one, it is true he did not, when he applied to the orphans court for direction as to investing the money which it represents, actually have the money in his hands for investment, though he may be said to have had it so in a certain sense. He owed it to the ward, and by the petition acknowledged his liability for it, and alleged his readiness to pay it by declaring that he had it in his hands for investment. He had in fact spent it in his own business, and had at that time been guilty of a *devastavit* as to it. The application was in fact rather an application for authority to secure money he had improperly expended, than for directions to invest the money in hand. But the propriety of the order of the orphans court cannot be called in question collaterally.

The surety, however, insists that he is discharged because the failure to pay on demand took place after the new bond was given. But the statute does not discharge existing sureties absolutely on the giving of a bond with new sureties, but only from liability for subsequent acts, defaults or misconduct of the principal. Their liability still continues as to acts, defaults and misconduct previous to the discharge. The defence under consideration was set up in the suit on the bond, but without avail. According to the evidence the waste of the estate took place before the new bond was given. There is no evidence to the contrary. The exceptions on both sides will be disallowed, and the master's report confirmed.

Bird v. Wiggins.

JOHN T. BIRD, executor, appellant, A

v.

MATTHIAS J. WIGGINS et al., respondents.

1. The proceeding to require an executor to give security in the orphans court may be by an order to show cause without petition.

2. An executor gave his testator, during the latter's lifetime, a mortgage for moneys loaned, but, owing to the testator's illiteracy, the mortgage was never registered.—*Held*, that the residuary legatees might require him to give security because he neglected to have the mortgage registered after it came into his hands as part of the estate, and also because he claimed certain credits for payments thereon, which appeared to be false.

Appeal from order of Hunterdon orphans court.

Mr. T. E. English, for appellant.

Mr. J. N. Voorhees, for respondents.

THE ORDINARY.

The appeal brings up for consideration the legality of an order directing the executor to give security. The order was made under the one hundred and nineteenth section of the orphans court act (*Rev. 778*), on the application of the residuary legatees, and the grounds, as appears by the order to show cause, were that the executor was indebted by bond and notes to the estate; that his property was a scanty security for the indebtedness; that he had not caused the mortgage given to secure the bond to be registered or recorded, although requested by the residuary legatees to do so, and that the interest was in arrears for several years on the bond and notes. The appellant objects to the order appealed from, on the ground that the proceeding was not by petition, but by order to show cause, as the first proceeding; that the allegations of that order were insufficient, if proved, to war-

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rant the order appealed from, and that, if sufficient, they were not established. There is no practice requiring that such an application shall be by petition. In this case the order to show cause stated the grounds of the application with sufficient distinctness and particularity. The testimony on which the orphans court made the order absolute is not before me. It appears not to have been taken down. The appellant, under an order of this court for leave to do so, took his own testimony, and on that and the exhibits, the cause is to be disposed of here. They disclose enough to warrant the order in question. The order to show cause was granted in July, 1881. It was made absolute on the 1st day of August following. The mortgage (which, it may be stated, is on the executor's wife's property) had not then been recorded, and it was not recorded until the 27th day of the latter month. It had not therefore been recorded or registered when it came into the hands of the appellant. He says he thought it had been. When produced by him in court there was endorsed on it a fraudulent certificate of record, which he professes to be unable to account for, but which probably was not put there by the testator, who appears to have been an illiterate person. An examination of the appellant's book of accounts offered in evidence by him (not to speak of the endorsements on the bond and notes) provokes grave question at least, not only as to his claims against the estate for goods &c. furnished, work done and money lent, but also as to his alleged payments on account of the money due on the bond, receipts wherefor are contained therein. The order in question will be affirmed, with costs.

Mount v. Van Ness.

JOSEPH S. MOUNT, administrator, appellant,

v.

GEORGE VAN NESS, respondent.

An administrator converted dividend-paying bank stock of the estate into money, and with it paid off a mortgage on lands in which he had an interest as heir of the intestate. On exceptions to his account, credit for that payment was disallowed.—*Held*, that he was chargeable with interest at the legal rate on that amount from the date of the payment, including the time during which litigation on the exceptions continued.

On appeal from decree of Mercer orphans court.

Mr. A. G. Richey and *Mr. G. D. W. Vroom*, for appellant.

Mr. James Wilson, for respondent.

THE ORDINARY.

The appellant, who is the administrator of the estate of William B. Mount, deceased, on the 7th of February, 1878, paid off, out of the personal estate in his hands, a mortgage upon real estate of the deceased. The amount paid was \$4,101.11. The mortgage debt was not chargeable on or payable out of the personal estate. *Mount v. Van Ness*, 6 *Stew. Eq.* 262. The heirs, therefore, took the land subject to the encumbrance. The orphans court, on the settlement of his account, charged the administrator with interest on the money so paid by him, from the time of payment. He insists that he is not chargeable with interest thereon, or, if chargeable at all, is not chargeable with it for the period during which the litigation on the exceptions to the credit claimed by him in his account for the payment continued. The money paid was derived from the sales by him of valuable productive bank stock belonging to the estate. But he urges that it was his duty to convert that stock into cash, and he

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insists that, having so converted it, he would have been at liberty to hold the money without investment until the settlement of his account, and that, if he had done so, he would not have been chargeable with interest; and that, though he paid it away wrongfully, he did so honestly and under a mistake of law, and therefore ought not to be charged with interest merely because of that payment; and he insists that, especially, he ought not to be charged for the period of the litigation, inasmuch as that time was occupied in judicially establishing his liability to answer out of his own estate for the money paid. It appears that he is one of the heirs of the intestate, and as such was one of the owners of the property from which the mortgage was removed. He applied the money to his own use, therefore. He is, under the circumstances, entitled to contribution from his co-tenants in common for the money he so expended to relieve their common property from the mortgage. And if he were not, it would make no difference, for he used the money to pay off an encumbrance on property in which he was interested. The litigation on the exceptions became necessary only because he claimed that the debt which he thus paid was chargeable on the personal estate, and persisted in the illegal claim. The effect of his mistaken application of the money was to relieve his property from an interest-bearing debt to the same extent to which he, by the decree of the orphans court, is required to answer for it. The familiar principle that a trustee who uses the trust money in his own business is bound to pay interest, governs the case.

The decree will be affirmed, with costs.

Middleton v. Middleton.

ALLEN MIDDLETON et al., appellants,

v.

CHARLES MIDDLETON, respondent.

The orphans court has no power to allow one executor the amount of a debt which he insists is due him from the testator's estate, or of a fee which he claims to have paid counsel for advice in regard to the estate, if his co-executors dispute their payment.

Appeal from order of Burlington orphans court.

Mr. J. C. Ten Eyck, for appellants.

Mr. J. N. Stratton, for respondent.

THE ORDINARY.

The testator appointed four executors, all of whom proved the will. The entire estate appears to have gone into the hands of three of them, the appellants; the other, the respondent, received no part thereof. The appellants filed an account in the Burlington orphans court, purporting to be the account of all four, while, in fact, it was only their own. The respondent claimed to be a creditor of the estate, in respect of debts which he alleged were due him from the testator, and also for money paid by him for legal advice as to his duty as executor in reference to that part of the estate which was in Pennsylvania; which claims his co-executors refused to pay. He filed exceptions to the account, because, among other reasons, of such refusal, and because the account was theirs, and not his. The orphans court allowed all the exceptions, and ordered that the executors be credited with the claims in the account. From that part of the order which allowed the claims the three accounting executors appealed.

The court had no jurisdiction to try the validity of the claims

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against the estate for debts alleged to be due to the respondent from the testator. Our statutes confer no authority on the orphans court to try disputed claims, except in the case of insolvent estates. *Miller v. Pettit*, 1 Harr. 421; *Vreeland v. Vreeland's Admr.*, 1 C. E. Gr. 512; *Smith v. Smith's Admr.*, 12 C. E. Gr. 445. Nor was the court warranted in ordering that the claim of the respondent for money paid by himself for legal advice be allowed in the account. The three accounting executors had refused to pay it. To justify the orphans court in allowing a claim against an estate, it must appear that the executor or administrator assented to or recognized it as a debt due from the estate. *Vreeland v. Vreeland's Admr.*, *ubi supra*. The orphans court could, indeed, properly have passed upon the question as to the amount of counsel fees to be allowed to the accountants, on exceptions by a person in interest or of their own motion. But, in fact, in the case under consideration, they ordered the payment by the accountants to their co-executor, who was not an accountant, of a sum of money paid by him, as he alleged, for legal advice given to him in behalf of the estate.

The order of the orphans court will be reversed, so far as the allowance of the claims in question is concerned, with costs, but in all other respects it will be affirmed.

CASPER LOSEY, administrator, appellant,

v.

CATHARINE WESTBROOK et al., respondents.

A testator gave his homestead and a certain legacy to his wife for life, charged on a farm given to his son Andrew. He then made devises to his daughter Sarah, to the children of his daughter Margaret, and to the children of his daughter Temple. He then devised a farm to his daughter Catharine, and added, "And I do further order that the said Catharine shall have an amount of money paid to her in addition to the above-said farm, out of my estate, to make her share *equal with the rest of my children named.*" He

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then gave his residuary estate equally to his other children and their representatives, not before provided for. He then ordered that the property given to his wife be sold after her decease, "and the proceeds of the same shall be equally divided among my last-mentioned children." After the widow's death, the farm given to her for life was sold.—*Held*, that Catharine was entitled to share the proceeds equally with her brothers and sisters, mentioned in the residuary clause, the testator's intention being that the proceeds should be part of the subject of that clause.

Appeal from decree of Sussex orphans court.

Mr. C. D. Thompson and Mr. L. Van Blarcom, for appellant.

Mr. A. R. Shay, for respondents.

THE ORDINARY.

The only question involved in this appeal is as to the construction of the will of John Losey, deceased, late of Sussex county. By it, after directing the payment of his debts and funeral charges, he gave to his wife his homestead and household furniture (with directions to sell the latter, with certain exceptions, in case she should not keep house after his death) and the interest of \$1,000, to be secured by mortgage on the farm on which his son Andrew then lived. He then made the following devises and bequests: To his daughter Sarah Yetter, the farm on which she resided, charged with the sum of \$200, to be paid to his executors; to the children of his deceased daughter Margaret Swartswelder, \$600; the like sum to the children of his deceased daughter Temple Keen; and to his daughter Catharine Westbrook the farm on which she then lived, with an additional lot of land; that farm, with the addition, to be valued at \$700. And he added as follows:

"And I do further order that the said Catharine Westbrook shall have an amount of money paid to her in addition to the above-said farm out of my estate, to make her share equal with the rest of my children named."

He then ordered his executors to sell the farm on which An-

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drew Losey lived in one year after his (the testator's) decease, and proceeded as follows :

"To my remaining children, Mary Van Horn, wife of Philip Van Horn; Elsie Thompson, wife of Samuel Thompson; John Losey, Casper Losey and Andrew Losey, I do order that my remaining property, of whatever kind, after the above legacies are paid, shall be equally divided between them; each to have equal shares, one with the other; the amount that will be due to my daughter Mary Van Horn, wife of Philip Van Horn, I want her to have the interest of the same during her lifetime, and after her death I want the same equally divided among her children."

He then added :

"The lot left to my wife, Sarah Losey, and the property of whatever kind left to my wife, I do order shall be sold after her decease, and the proceeds of the same shall be equally divided among my last-mentioned children."

The will is dated April 14th, 1866, and it was proved in November following. In April term, 1868, of the Sussex orphans court, the executor, John H. Losey, rendered an account, which was passed. In it he prayed and obtained allowance for the \$1,000, the interest of which was, by the will, given to the testator's widow. The balance in his hands was \$5,001.23. The executor, after having added to that balance the sum of \$700 for the valuation of the farm and addition thereto devised to Mrs. Westbrook, and deducted the revenue tax, paid Mrs. Westbrook, in April, 1868, a sum of money equal, with the \$700, to the one-sixth of the remainder, and took from her a receipt and discharge under seal, and signed by her and her husband, by which they acknowledged that they had received from him \$940.70 in full "for the share and proportion due her from the estate in his hands, and thereby discharged, acquitted and released him from payment to them or either of them of any other moneys on account thereof." The receipt is dated April 13th, 1868. The executor died in February, 1870, and in March following, the appellant was appointed administrator *cum testamento annexo de bonis non*. In September term, 1875, the administrator rendered an account in the orphans court, by which it appeared that

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the estate then in his hands was a balance of \$955.51, consisting of principal and interest of a bond and mortgage, taken to secure the widow the interest given to her by the will. The widow died in 1880. The administrator, after her death, collected the money due on that bond and mortgage, and sold the homestead property, and, without an order of any court, distributed the money from both sources as follows: one-fifth to each of the following children of the testator: Mrs. Mary Savercool (formerly Van Horn), Mrs. Thompson, Andrew Losey and Casper Losey, and one-fifth to the children of the testator's son John; paying nothing to Mrs. Westbrook. The administrator was subsequently required to file his final account, which he did, and it was duly passed. Afterwards, on the petition of Mrs. Westbrook, a decree of distribution was made by the orphans court, directing that the fund be distributed and paid as follows: to Mrs. Savercool, Mrs. Thompson, Mrs. Westbrook, Andrew Losey and Casper Losey, each one-sixth, and to the children of John Losey, one-sixth. From that decree the administrator appealed, and the question is as to the correctness thereof, and that depends on the construction of the will. It is agreed that the testator meant by the words "the rest of my children named," at the close of the clause containing the specific devise to Mrs. Westbrook, not all of his children named in the will, but only those named in the residuary clause. He manifestly intended that Mrs. Westbrook should have an equal share with the other children named in the residuary clause in the entire residue, for he says so. Of course he intended that in ascertaining her share the valuation of \$700 should be taken into the account. The subject of the disposition in the residuary clause is not part only of the residue of his estate, but the whole of it. The appellant insists that Mrs. Westbrook is excluded from participation in the fund, which is made up of the proceeds of the sale of the homestead, and the fund the interest whereof was given to the widow for life. He bases this claim on the language of the clause immediately following the residuary clause. The clause in question is as follows:

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"The lot left to my wife, Sarah Losey, and the property of whatever kind left to my wife, I do order shall be sold after her decease, and the proceeds of the same shall be equally divided among my last-mentioned children."

The proceeds of the sale of the homestead and the fund set apart for the widow would have passed under the residuary clause, but the clause just quoted was inserted to remove all possible doubt on the subject, and the reason why Mrs. Westbrook was not named in it is the same as the reason why she was not named in the residuary clause. The testator had provided that whatever the gift to his children named in the residuary clause, she should be equal with them, taking into account the specific devise to her. Nor is she estopped by the receipt from claiming participation in the distribution of the fund in question. It was manifestly intended to cover no more than the fund in hand for distribution at the time it was given.

The decree will be affirmed, with costs.

WILLIAM H. RUSLING et al., appellants,

v.

SARAH H. RUSLING et al., respondents.

1. The verdict of a jury on an issue sent from the orphans court is not conclusive, and the finding as to the capacity of a testator, undue influence &c., may be reviewed in this court.

2. If the evidence taken at the circuit has not been reduced to writing it can be taken anew here, and other testimony than that produced below admitted.

3. Undue influence over a testator must be satisfactorily established by other evidence than his declarations, although they are admissible to show the extent and effect of such influence.

4. The will in this case sustained, but not the codicils, they being held to have been executed while the testator was suffering under senile dementia.

Appeal from decree of Mercer orphans court.

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Mr. W. D. Holt, Mr. M. Beasley, Jr., and Mr. B. Gummere,
for appellants.

Mr. W. F. Gaston, Mr. A. G. Richey, and Mr. G. Collins, for
respondents.

THE ORDINARY.

This appeal is from the decree of the orphans court of Mercer county refusing to admit to probate three instruments of writing, one purporting to be the will of Gershom Rusling, deceased, late of that county, and the others, two codicils thereto. The will is dated January 4th, 1875; the first codicil January 13th, 1879, and the other January 30th, in the last-mentioned year. The proponents are the executors, General James F. and William H. Rusling, two of the sons of the testator, and the caveators are his widow and his other son, Gershom Rusling. On the application of the caveators, the orphans court, under the provisions of the statute, certified the questions involved into the circuit court of the county of Mercer for trial before a jury. Those questions were, Whether the instruments were duly executed; whether, at the time of executing them, the testator was possessed of testamentary capacity, and whether the execution thereof was procured through undue influence, imposition or fraud upon him. The issue framed thereupon was tried in the circuit court before the chief-justice, and the trial resulted in a verdict against the will and codicils. The orphans court, as directed by the statute, made a decree in accordance with the finding, and it ordered that the costs of both sides, with their counsel fees, be paid out of the estate.

The respondents insist that the finding is conclusive, and that inasmuch as there is no error in the entry of the decree upon it, the decree must be affirmed. The statute provides (*Rev. p. 756 §§ 19, 20*) that when any caveat shall be filed against the probate of a will, the orphans court may, on the application of the caveator or of the persons named as executors in the will, certify the questions involved in the controversy into the circuit

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court of the county, for trial before a jury ; that upon filing the certificate with the clerk of the circuit court, that court shall have jurisdiction to try the cause on an issue to be framed by the judge holding the court ; that the notice for trial, proceedings for summoning and empaneling a jury and of the trial of the cause, shall be the same as in causes commenced in the circuit court ; that the same costs shall be taxable as in other causes in that court ; that the verdict of the jury shall be subject to be set aside and a new trial granted in the circuit court as in other cases in that court, and that the judge may, on an application for a new trial, certify it to the supreme court for its advisory opinion. It further provides that on the trial in the circuit court the testimony of the witnesses shall be taken down in writing, if required by either of the parties, and that exceptions may be taken to the admission and rejection of testimony, which shall be entered upon the record ; that it shall be the duty of the judge before whom the issue is tried, forthwith, after the trial is finally concluded, to certify and return to the orphans court the proceedings thereon had, and the verdict of the jury, together with the testimony, if it shall have been reduced to writing, a copy of the charge to the jury, all exceptions which shall have been taken at the trial to the admission or rejection of evidence, or to the charge to the jury, a certified copy of the costs which shall have been taxed, and a statement of the expenses of the trial ; that the certificate and return shall be filed by the surrogate, and thereupon the orphans court shall proceed to make a decree touching the probate of the will, in accordance with the finding of the issue, and may make such order concerning the costs and expenses and allowance of counsel fees as may be made in cases where the hearing upon a caveat against proving a will is had before the orphans court. This provision for the trial by a jury, in the circuit court, of the questions arising on the application for probate of a will, has been held not to be in contravention of the constitution. *Embley v. Hunt*, 2 *Stew. Eq.* 306. If, as the respondents' counsel insist, the finding of the jury is conclusive as to the merits of the controversy, they cannot be considered on appeal. But the constitution provides that all

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persons aggrieved by any order, sentence or decree of the orphans court, may appeal from the same, or from any part thereof, to the prerogative court, and that such order, sentence or decree shall not be removed into the supreme court or circuit court, if the subject matter be within the jurisdiction of the orphans court. *Const. art. VI. s. 4 § 3.* And the statute makes like provision for appeal, limiting the time for the exercise of the right. *Rev. p. 791 § 176.* The right of appeal thus secured by the constitution cannot be taken away by the legislature. It was designed to afford to the litigant a review by this court of the judgment of the orphans court in all orders, sentences or decrees, within the jurisdiction of that court, by which he may be aggrieved. And where the verdict of a jury is substituted by law for the finding of that court, the right of appeal involves a review of the finding here. Otherwise, in such cases, the right would be unsubstantial and of but little, if any, value. The legislature did not intend to affect the right. The finding is conclusive upon the orphans court, but not on this. It is to be dealt with here as the court of chancery deals with an issue sent out of that court, except that that court may, if dissatisfied with the verdict, send the matter to another jury, if it sees fit to do so, while this court, on the contrary, if not satisfied with the verdict, must itself proceed to judgment on the merits. The statute does not ordain that the testimony shall be taken down in writing, except where the parties, or one of them, require it. On an appeal from a decree based on the finding of an issue, if no such requirement shall have been made, and the testimony shall not have been reduced to writing, this court would, in accordance with its practice, give leave to take the testimony here. And in its review of the decree, it would not be confined to the testimony or the witnesses before the jury, but would pass upon the merits in the light of the testimony taken here. Where this court is called upon to review, on appeal, either the finding of a jury or the decision of the orphans court, on a question of fact on the record of the testimony of the witnesses who were before the jury or orphans court, the fact that the jury or orphans court had the advantage of seeing and hearing the witnesses,

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and noting their manner in giving their testimony, while this court has their testimony in print or manuscript only, and neither sees nor hears them, is not to be forgotten; but this court is as free to consider and decide upon the merits as it would be if the cause were before it originally. In this case I am called upon to review the decree upon precisely the same testimony which was before the jury. As before stated, the verdict was against both the will and the codicils, and was based both on the ground of want of capacity and the existence of undue influence.

The will was made in January, 1875, and the codicils in January, 1879, four years afterwards. When the will was made, the testator was about eighty-one years of age, and when he made the codicils he was about eighty-five. He left a widow, who was his third wife, and three children, the sons before mentioned, Gershom, William Henry and James, and a granddaughter, Eliza R. Bray, still a minor, the sole issue of a deceased daughter who died in 1873. He had another daughter, Mrs. Hance, who died in 1872, without issue. Not only do the testamentary witnesses testify to his competency when the will was made, but the great preponderance of the other evidence in the cause on the subject establishes the fact that he was then possessed of testamentary capacity. At that date he transacted business, and his competency to do so appears not to have been questioned by those with whom he dealt. The will, it should be stated, was drawn by his son, General Rusling, who was a lawyer in Trenton, where the testator lived. It is an important fact that, in October, 1873, and December, 1874, the testator made two wills, both of which were drawn by Mr. James S. Aitkin, a lawyer, also of Trenton, and who was in no way connected with him, the instructions for each of which were given by himself, without assistance from any one. The latter will was executed within a month of the time when the will in question was made. On the occasions when those wills were drawn by Mr. Aitkin, the testator called upon him alone and consulted with him, giving him his instructions. Mr. Aitkin made a memorandum of the instructions and read it over to him, and he approved of it. The

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will was subsequently drawn, and on another day he came to Mr. Aitkin's office to execute it. The will was read over to him, and he approved of it and executed it. His conduct in making those wills bears all the evidence of the possession by him, at those times, of full testamentary capacity. The will in question differs from that drawn by Mr. Aitkin and executed but a few days previously, only as to the limitations over of a legacy of \$5,000 given to the granddaughter, and those of a fund of \$4,000, which the testator directed to be invested during his wife's widowhood, for her benefit. By the will of 1874, he directed that the legacy to Miss Bray be invested for her benefit, and that the interest be paid over to her, at the discretion of his executors, during her minority, and that, on her attaining to her majority, the fund, with all its unappropriated interest, be paid to her. By the will in question, he directed that the fund be invested and the interest applied, in the discretion of his executors, for her advantage during her minority, and if she should marry and have lawful issue which should attain to the age of two years, the principal and all unappropriated interest was, on the issue's attaining to that age, to be paid over to her as her separate estate, with full power to dispose of it; but power was given to the executors to pay over the fund to her after she should have reached her majority, if they should see fit to do so. The will also provides that, in case she should die before attaining her majority, or if, having reached it, she should die without lawful issue before the legacy should have been paid to her, the fund should be divided equally between the testator's sons William Henry and James. By the will of 1874, the fund of \$4,000 for the testator's widow was, on her death or remarriage, to be equally divided among his three sons and his granddaughter, Eliza R. Bray. By the will of 1875, it is to be divided equally between William Henry and James. The will of 1874 gave \$2,500 more to William Henry than to James. By that of 1875, the gifts to them are equal. The main reason for making a new will in 1875 was that the testator had learned that, under the provisions of the will of 1874, the legacy to his granddaughter, Miss Bray, would be a vested legacy, and in

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case of her death during her minority, would go to her father, which he not only did not contemplate, but was desirous of preventing. He wished that, in that event, it should go to William Henry and James. Another reason was that James was very sensitive (and so expressed himself to his father) in regard to the inequality between the gifts to him and William Henry in the will of 1874. He apprehended that it might stigmatize him in the minds of people; and he therefore requested his father to carry out his design to give William Henry \$2,500 more than him in a different way—that is, by advancing that sum to the former and making them equal in his will. The testator appears to have been willing to humor him in that fancy. He also seems to have desired to confine Gershom's and Eliza's interest in his estate to a legacy of \$5,000 to each of them.

The widow and Gershom, the caveators, urge that the will of 1875 is unjust to them—that fairness in the testamentary disposition of his property required the testator to make much larger provision for her and to give to him an equal portion with his brothers; and they also urge that justice required that he give to Eliza the share which her mother would have had, had she lived. An examination of the various previous wills of the testator which have been offered in evidence, shows that the will in question was, in all these respects, in accordance with his settled designs. It gives to the widow \$2,000 absolutely, and the interest of \$4,000 during widowhood, and it gives her all the property which she brought to the testator or acquired afterwards with her own estate. These bequests are declared to be in lieu of dower. She married the testator in 1860, and was his third wife. She had property of her own then, and had expectations, also, which have since been realized, and she admits that she is now worth, irrespective of the provision made for her by the will, at least \$11,000, without taking into the account a mortgage of \$5,000 held by her on her brother's property. The testator appears to have borrowed \$1,000 from her in or about 1863. By the will of that year (it is dated December 5th), he gave to her an annuity of \$120 during her widowhood, and \$1,000, which he states is the amount of certain moneys

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which he had received from her of her separate estate, after their marriage. He also gives her all the personal property she brought to him. These gifts are declared to be in lieu of dower. By the will of 1865 he made the same provision for her, except that he gave her an annuity of \$180, instead of one of \$120. By the will of 1873, he gave her \$2,000, with interest from his death and the interest of \$4,000, equal, at the rate of interest then allowed by law, to an annuity of \$280. He also gave her all the property she brought him at her marriage, and all she had acquired afterwards, and these gifts were expressed to be in lieu of dower. The will of 1874 makes the same provision for her, and so does the will in question. So that, so far as the provision for his wife is concerned, the will of 1875 was in accordance with his intentions as evidenced by his wills from 1863. The provision for Gershom in the will of 1875 is, except so far as the change between the provisions of that will and those of the will of 1874 above stated are concerned, also in accordance with the testator's intentions, as shown by the previous wills. By the will of 1863 (his daughters were then living), after making provision for his wife and the payment of his debts, and the expenses of settling his estate, he gives the residue to his three sons and his two daughters, but in such shares that William Henry and James and his daughters should each receive two shares thereof, and Gershom but one; and he states that the reason of the difference in the shares is, that he has made advances to Gershom since the latter attained his majority. The same provision is made, in the same language and the same reason given, in the same way, in the will of 1865. In the will of 1873, he gives to Gershom \$4,000; to Eliza R. Bray, the granddaughter (both his daughters were then dead), \$4,000, and to his sister, Mary Sharp, \$1,000; and he also gives Gershom an equal share with William Henry and James in the \$4,000, the interest of which is given to the widow, but makes no other provision for him. By the will of 1874, he makes precisely the same provision, and no more, for him. It thus appears that from 1863 the testator intended to give Gershom only about \$5,000. As to the provision for the grand-

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daughter, the amount of it is the same in the will of 1875 as it was in that of 1874. In the will of 1873 (it is, as before stated, dated in October of that year, and her mother died in the preceding March), the testator gave her only \$4,000. It will be seen, then, that in the will of 1875 the testator did not depart from his intentions, long previously entertained, as to the provision for his widow, and it shows, also, the same intention in the main in regard to Gershom as was exhibited in the preceding wills. The change made in the will of 1875, in the provision for the granddaughter, was not in the amount of the legacy, but as to the manner of enjoyment and the destination of the fund in certain contingencies. The executors are the same—William Henry and James—in all the wills. The wills of 1863 and 1865, it should be stated, were drawn by Isaac W. Lanning, esq., then a lawyer residing in Trenton. But if the testator was possessed of testamentary capacity when the will in question was made, and the will is not the result of, or affected with fraud, it must be established (it was executed with all due legal formalities), and it is not necessary to search for reasons for the disposition which it makes of the testator's property. *Stat pro ratione voluntas.* It may be added that as late as 1877 the caveators seem to have considered the testator competent to make a will. I am of opinion that at the time of executing the will in question the testator was possessed of testamentary capacity.

But it is urged by the caveators that he was induced to execute the will by fraud on the part of his son James. They rely for proof of the fraud, which is charged to have been undue influence, on the declarations and statements of the testator. On the trial, the chief-justice charged the jury that such declarations and statements were not lawful evidence thereof; that it must be shown by other evidence, and that unless there was substantial evidence independent of such declarations, that James had and exercised the alleged power or dominion over the mind of his father, there was no legal proof of it, and that the declarations were only competent evidence to show the effect

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of the power and its exercise. That charge was in accordance with the settled law on the subject in this state, although it has never been so declared, indeed, by the court of last resort. Applying it to the evidence, there is no proof of the alleged undue influence. The will should be admitted to probate.

To consider the codicils: They were made four years after the will, and the testator was then about eighty-five years old. He was in an advanced stage of senile dementia. To the first codicil Henry D. Phillips and Thomas E. Baker were witnesses, and to the other, Mr. Phillips and Hiram L. Rice. Both codicils were drawn by General Rusling, and they were both ready for execution when the witnesses were called in. Mr. Baker testified that Mr. Phillips, who was a clerk in General Rusling's office, called him in from his store, which was near General Rusling's office; that he went at once, and went into the back office, where he found the testator and General Rusling; that the latter told him his father wished him to be a witness to his signing the codicil, and he then called in Mr. Phillips, who came in accordingly, and General Rusling stepped to his father and said, "You called Mr. Baker here to witness the codicil to your will?" and the testator said yes, that he wanted him to witness it. Neither of the witnesses appears to have had any conversation beyond this with the testator at that time. When the second codicil was made, General Rusling called in Mr. Rice to witness its execution. Mr. Rice says he conversed with the testator for ten or fifteen minutes after the execution of the codicil on that occasion, on the subject of the comparative merits of old-time and modern Methodism, and that the testator conversed with intelligence and discretion. He subsequently says, however, that it could be clearly seen that the testator's mind was not in full vigor on all subjects; that sometimes he would repeat the same thing over again, and that his memory seemed to be a little at fault. Though he had known the testator for twenty-five years, he says he supposes he had not met him half a dozen times in as many years latterly. The other witness, Mr. Phillips, does not appear to have had any conversation with the testator. The

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proof is that the testator was at that time in a condition of senile dementia, so far advanced, according to one of the medical witnesses, as to be a complete imbecile. To advert to the testimony of some of the witnesses, not connected with the family, on the subject: James Hendley, who attended the testator occasionally from the summer of 1875 up to and including 1878, to put on or adjust a truss which he wore for hernia, from which he suffered greatly, testifies that in the latter part of 1877 the testator's memory was so bad that he would not recognize him; would ask who he was and what he wanted, and when his wife would tell him who he was, he did not appear to understand it; that when she told him what his business was with him—to put on the truss—he would seem to recollect him, but not through the whole conversation. He says he thinks it was the same in 1878, in which year his visits were frequent. He did not attend him in 1879. George F. Wilson, who lived in the house adjoining that in which the testator lived, from the spring of 1877 to the time of the testator's death, testifies that in 1877, and up to 1880, the testator would frequently come into the witness's house and say he was afraid, or that some one was going to hurt him, or something of that kind, and would want to stay all night; and quite frequently, when the door was open, he would run right into the house, and, in fact, came in several times when the dead-latch was up, and was found by members of the witness's family wandering about in the dining-room or parlor; that he would generally be excited when he came in, and frequently would say some one was going to rob or kill him, and that he appeared to be in terrible fear, and exhibited great earnestness, and seemed to be very much excited, and was oftentimes crying bitterly. He adds that he seemed to be constantly growing worse. He also says that at times he would seem to be quite rational, but only for a few sentences. George D. Scudder testifies that in the fall of 1876, or early in 1877, he saw the testator, as he was passing the latter's house, standing by the fence in his front yard; and the testator accosted him, and said, "Young man, I want you to come here and stay in this house to-night; this property will be all yours when I am gone, and I want you to look after it. I stayed here last night, but they treated me so badly

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I don't want to stay any longer." The same witness speaks of seeing him in the street-car on an occasion, about 1879, when the testator was accompanied by his son William Henry; and the testator asked what place the First Presbyterian Church was, and what place General Rusling's house was—places with which he was perfectly familiar when of sound mind. Alexander Birdsell says that soon after December, 1876, the testator, as the witness was passing his house, asked him what the distance was from the house to a neighboring church; and when he replied that it was about one hundred and fifty or one hundred and seventy-five yards distant, as it was, the testator answered that he was mistaken; that they had measured it when the turnpike was laid out, and it was a mile, or about a mile. He further says that in 1877 he saw him standing at the fence in front of his (the testator's) house, holding tightly to the railing; that the testator said to him that he had to go to Trenton that night, and had just missed the only train, and that if the witness would hire a team and take him to Trenton, he would pay all necessary expenses and reward him amply for his trouble. The testator was then in Trenton. Benjamin Gooding, who was an attendant of the testator for about three weeks, in 1878, testifies to his great infirmity, both of mind and body, at that time, arising, manifestly, from the progress of decay from age. Among other things strongly exhibiting his feebleness of intellect, he says that he very seldom recognized him when he came in, but received him as a stranger. Franklin S. Mills testifies to an incident which occurred in the fall of 1878, in which the testator, in the street in Trenton, causelessly and with tears implored protection from him against William Henry, who was attending him. Mr. Mills says that from that time he considered him childish. Charles Bechtel says that, up to 1879, the testator would always know him, but after that he only recognized him occasionally. Anthony Wengert, the barber by whom or by whose employees the testator was shaved, says that in 1878 or 1879 the testator did not talk sensibly. Judge Scudder relates a conversation which took place in 1878, in which the testator gave evidence of great mental imbecility. Dr. Phillips says that in October and

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November, 1878, the testator was in a condition of general ill-health, and there was considerable mental disturbance; that his physical condition was one of great prostration, and his mental condition corresponded with his physical. He also says that in 1878 or 1879 the testator was in an early stage of senile dementia, and that in November, 1878, he was "in a condition of a sort of maniacal outbursts, to which senile dementals are subject on occasions." He saw him on the 11th of January, 1879, but had very little conversation with him, and his opportunity for observing his mental condition does not appear to have been such as to enable him to give a reliable opinion on the subject. Dr. Woolverton, whose opportunities for observation were excellent, says that for the three years next preceding his death the testator was what he would call an entire imbecile. From this testimony (and there is much more to the same effect), it can be gathered what the condition of the testator's mind was at that time. It is to be remembered that the codicils were made within a few days of each other, and have reference only to the legacy to the granddaughter.

It appears from General Rusling's testimony that the testator was induced to make them through the statements and urgency of his wife. He says she filled his (General Rusling's) mind with all sorts of disagreeable stories about the girl, and inveighed bitterly against her, and urged that the will be altered so that she would have only the interest of her legacy. General Rusling was embarrassed with the matter, and reluctant to move in it. His language is:

"I did not know what to do about it; my father was old and feeble, and I anticipated that at some time we would have to fight out this affair; I was greatly anxious about it; Mrs. Rusling still insisted something must be done, and brother Henry was anxious something should be done."

He then says that his father was communicated with, and said she ought to be cut off without a dollar, and wanted the will fixed in some way so that she could only have the income of the \$5,000. He further says:

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“ I said but little about it; I said she is a young girl; life is before her, and she may reform, and I don't think it well to tie up the money; further on, some days before the date of the first codicil, my father came into my office alone, and sat down, and told me of these stories that Mrs. Rusling had recited in my presence and in the presence of my wife, and I think Miss O'Kell, and in the presence of my cousin, Mary A. Snyder, and said that he wanted Lyda's [Eliza's] portion fixed so she could not have anything but the income of it.”

He says the testator insisted upon it, and he drew the codicil. He proceeds to speak of the history of the second codicil as follows:

“ After some time, my father—Mrs. Rusling was still inveighing against my niece; I beg to be excused from telling the stories she told me; I do hope she won't insist on my telling them before this court; I have cause to believe that some of the stories she told me were not true; the most I knew about Miss Bray at that time was what Mrs. Rusling told me; father came to my office repeatedly, very angry, and when I met him at the house he was very angry; he said to me on repeated occasions, ‘ I want to cut Lyda Bray off; I don't want her to have one penny of my property; she don't deserve it; her conduct is such as to disgrace me and my family, and I don't want her to have one penny of my money.’ ”

It will be seen that the action of the testator in making the codicils was entirely due to the tales told him by his wife to the discredit of his granddaughter (General Rusling says she inveighed bitterly against the girl), and the pressure made upon him to change his will in respect to her legacy. It appears, from his testimony, that General Rusling was a very reluctant actor in the matter. What those tales were does not appear. General Rusling says they were “ all sorts of disagreeable stories.” He also says that the most that he knew about [against] the granddaughter then, was what his stepmother had told him. There is no proof whatever as to what the alleged misconduct was; but it appears that at the very time when the tales were told the granddaughter was a visitor in General Rusling's family. Beyond all question, the testator then was of very weak mind, to say the least of it, and it is very evident that the charges and pressure had a great effect on him. According to the weight of the evi-

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dence, he was not then possessed of testamentary capacity. In this connection it may be stated that the executors appear to have hesitated to offer the last codicil for probate. By their statement in writing, attached to it, the hesitation is attributed to the fact that the sole effect of that codicil is to reduce the legacy to Miss Bray, and add the amount taken from her to the gifts to them.

The decree of the orphans court will be reversed so far as regards the will, and the will will be admitted to probate, but as to the codicils, the decree will be affirmed. It will also be affirmed as to the direction that the costs and counsel fees of both sides be paid out of the estate, and also as to the amounts allowed. The costs of this appeal, with a counsel fee of \$250 to each side, will be paid out of the estate.

ANNA GREINER, admx. of Louis Greiner, deceased, appellant,

v.

WILLIAM GREINER et al., respondents.

WILLIAM GREINER et al., appellants,

v.

ANNA GREINER, admx. of Louis Greiner, deceased, respondent.

1. An administratrix assigned to her counsel certain stock of the estate, and he immediately transferred it to her individually. On a bill in chancery against her by the next of kin, the transaction was declared fraudulent, and the administratrix was ordered to hold the stock and account in chancery for it and its accumulations, and was enjoined from disposing of it.—*Held*, that, in settling her account, she was, under the circumstances, entitled to an allowance for the depreciation of the stock pending the injunction.

2. A widow may reclaim from her husband's estate moneys of her separate estate which she loaned him during his lifetime, and which he applied to the payment of a mortgage on lands, the title to which stood in the names of her husband and her husband, as husband and wife.

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Appeal from decree of Essex orphans court.

Mr. J. W. Taylor, for the administratrix.

Mr. J. Whitehead, for the next of kin.

THE ORDINARY.

These are cross appeals from the decree of the Essex orphans court upon the final account of the administratrix of Dr. Louis Greiner, deceased. Her husband, Dr. Greiner, died intestate in November, 1874. The administratrix filed her inventory of the estate December 21st, 1874. It included two hundred and fifty shares of the capital stock of the Newark City Mutual Insurance Company as the property of the deceased, which were appraised at \$12,500. On the next day after the filing of the inventory she assigned that stock to her counsel, merely for the purpose of obtaining title thereto herself, for her own personal use, by means of an assignment of it by him to her; and he, by an assignment dated the next day, transferred it to her accordingly. She filed her final account in the orphans court, September 30th, 1875. In it she charged herself with the amount of the inventory, and, among other things, claimed allowance for

NOTE.—It has been held that a husband could mortgage his interest in lands conveyed to him and his wife, during his wife's life, *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Harding v. Springer*, 14 Me. 407; *Bomar v. Mullins*, 4 Rich. Eq. 80; *Boykin v. Rain*, 28 Ala. 332. But see *Ketchum v. Walsworth*, 5 Wis. 95; *Chandler v. Cheney*, 37 Ind. 391.

In *Creighton v. Clifford*, 6 Rich. (N. S.) 188, lands were conveyed in trust for a husband and wife, with a power of sale, at their request, for re-investment to same uses.—*Held*, that a bond and mortgage thereon given by the trustee, at their request, to secure an individual debt of the husband, was void as to the wife, but valid as to the husband.

In *Grute v. Locroft*, Cro. Eliz. 287, a lease of lands held in joint-tenancy with his wife, made by the husband, to commence after his death, was held good, although the wife survived. See *Emmert v. Hays*, 89 Ill. 11.

In *Watts v. Thomas*, 2 P. Wms. 364, a husband, after marriage, purchased a term for himself and wife, and the survivor, and afterwards assigned the term in mortgage, to be void on payment of the money by himself or his wife, with covenant for quiet possession until default. Seven years afterwards, the husband contracted debts and died.—*Held*, that the settlement was assets to pay creditors.

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\$3,830.28, with interest, as the amount of a loan which she claimed to have made July 4th, 1874, to her husband, of her own money, received by her from her mother's estate. On the 12th of October, 1875, the next of kin (who are the brothers and sisters of the intestate) filed exceptions to the account, and in December, 1876, those exceptions were referred to a master in chancery. By a final decree of the court of chancery, made May 30th, 1877, in a suit brought by the next of kin to set aside those transfers of stock as fraudulent, they were decreed to be fraudulent and void, and the administratrix was required to account in that court for any and all dividends received by her thereon, or upon any accumulations of capital stock thereon; and was enjoined from selling, assigning, transferring or in any way encumbering or disposing of the stock or accumulations until the further order of that court. On the 11th of May, 1880, the master reported that the administratrix should be charged with a stock dividend, which was declared on the stock inventoried, and with the dividends received by her on both, and interest thereon, and that her claim for money lent and interest thereon should be disallowed. She excepted to the report in both respects. The exceptions on both sides were heard in the orphans court in June, 1880, but the decree was not made until June, 1881. In Decem-

In *Back v. Andrews*, 2 Vern. 120, a husband purchased a copyhold estate, with the surrender to himself, his wife and daughter and their heirs. A mortgage by the husband to plaintiff was held void as against the wife and daughter, after the husband's death.

In *Baker v. Lamb*, 11 Hun 519, a farm had been conveyed to a husband and wife.—*Held*, that the wife was not seized of a sufficient separate estate therein to enable her to charge it with the payment of a promissory note made by her.

In *French v. Mehan*, 56 Pa. St. 286, a wife surviving her husband, was held to take the entire interest in lands conveyed to her and her husband, as against a purchaser under an execution for debts of the husband. See *McCurdy v. Canning*, 64 Pa. St. 39; *Allston v. Bank*, 2 Hill Ch. 235; *Bennett v. Child*, 19 Wis. 362; *Cook v. Kennerly*, 12 Ala. 42; *Moss v. McCall*, Id. 630; *Jones v. Chandler*, 40 Ind. 588; *Beach v. Hollister*, 3 Hun 519; *Wade v. Krumm*, 54 How. Pr. 95; *Cleary v. McDowell*, Cheves 139; *Jones v. Fort*, 1 Rich. Eq. 50.

In *Simpson v. Pearson*, 31 Ind. 1, an administrator of a husband was held

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er, 1880, the administratrix presented an affidavit to the court that the stock, which was appraised at par, had fallen in value, and was then worth only about seventy or seventy-five cents on a dollar, and that by the before-mentioned decree of the court in chancery, she had been, from the date thereof (May 30th, 1877), enjoined from disposing of the stock or its accumulations, and therefore had been compelled to hold it notwithstanding the depreciation, and she thereupon prayed that the court would credit her with the amount of the depreciation in case it should confirm the master's report with regard to the stock. Thephans court, by its decree dated June 1st, 1881, confirmed the master's report as to the stock and dividends, but not as to the loan and interest which it allowed, and refused to make allowance to the administratrix for the alleged depreciation of the stock. It also ordered that a counsel fee of \$400 to each side and the costs of all the proceedings upon the exceptions be paid out of the estate. These appeals bring its adjudication as to all those matters up for review, but the only subjects presented on the argument were, on the one hand, the refusal to allow the amount of the depreciation, and, on the other, the allowance of the loan and interest and the order for the payment out of the estate of a counsel fee to the counsel of the administratrix

incapable to sell any interest in lands conveyed to the husband and wife, to pay his debts, the wife surviving. See *Simmons's Estate*, 4 Clark (Pa.) 204.

In *Prout v. Hoge*, 57 Ala. 28, a wife purchased lands with her own money, giving a mortgage thereon for a part of the purchase-money, and taking a bond for the title. Afterwards, for the better securing of the debt, the deed was made to her and her husband, who thereupon gave a mortgage on the premises for the unpaid purchase-money.—*Held*, that the wife was nevertheless entitled to enforce a conveyance to herself. See *Marburg v. Cole*, 49 Md. 402.

In *Anderson v. Tannehill*, 42 Ind. 141, lands were conveyed to a husband and wife and a third person, the husband and third person giving notes for the purchase-money, which the wife did not sign. She afterwards signed them.—*Held*, that the notes were void as to her, but that the vendor's lien for the purchase-money was valid as against her.

In *Banton v. Campbell*, 9 B. Mon. 587, lands and slaves were conveyed to a husband and wife. The husband, during his lifetime, made advancements of some of his own slaves to the heirs of the wife, who survived him. After-

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and the costs of the litigation—the next of kin insisting that the court should have ordered that the costs be paid by the administratrix out of her own funds, and that no counsel fee should be allowed to her. By the decree of the court of chancery the transfers of the stock were, as before stated, set aside as fraudulent, and the title to the stock thereupon stood in the administratrix in her representative capacity as such, but she was enjoined from selling, assigning, transferring or in any way encumbering or disposing of the stock or of any part thereof, or of any part of the accumulations, until the further order of that court. It is true, leave was given in the decree to either party to apply to the court on the foot of the decree as occasion might require. But the bill in the suit stated that neither the stock nor its accumulations or dividends were needed for the payment of any debts of, or claims against the estate, and prayed that the administratrix might be decreed to hold the stock and accumulations and dividends as trustee or administratrix, for distribution to the next of kin of the intestate, in the final settlement of the estate; and the decree not only required her to hold the stock and its accumulations and dividends, but required her to account in chancery for them. Under that decree she was justified in holding the stock for distribution and

wards the wife died.—*Held*, that the slaves advanced by the husband were not to be deducted from the heirs' interest in the wife's lands by survivorship, as advancements. See *Cleland v. Watson*, 10 Gratt. 159.

In *Snyder v. Sponable*, 1 Hill (N. Y.) 567, an unrecorded mortgage existed on lands conveyed to a husband and wife, of which notice was given to the husband, at the time of the conveyance, but not to the wife. The mortgage was afterwards foreclosed, and the purchaser under it sued the husband in ejectment and recovered. The husband having died, the wife brought ejectment against the one in possession under the foreclosure purchaser.—*Held*, that the record of the former recovery against her husband was inadmissible against her; and that the notice to her husband did not operate as notice to her, so as to give the mortgage priority over her title, especially if she paid the purchase-money; otherwise, if the consideration had been paid by the husband out of his own funds.

In *Meeker v. Wright*, 76 N. Y. 262, lands were conveyed to a husband and wife. The husband afterwards conveyed his interest in those lands, and also in other lands held by him in his own name, and also some personal property, directly to his wife by deed, she giving him a mortgage thereon for part of

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ould not be held to have been derelict in her duty because she id not sell it, unless, indeed, she became aware, at any time fter the decree, that the stock was likely to depreciate in the narket, in which case it was her duty (as it was her own interest, also), as a trustee, to apply to chancery for leave to sell. If, owever, she was not apprised of the probability of depreciation and had no reason to apprehend it, she incurred no liability to the next of kin on account of the depreciation, and it would be extremely unjust, under the circumstances, to visit upon her the consequences of the depreciation. The next of kin obtained the decree. They were not satisfied with setting aside the fraudulent transfers, but successfully sought to compel her to hold the stock for specific distribution for their own benefit. They themselves might, had they been aware of the probability of depreciation, have applied to chancery in the premises. The injunction which they obtained compelling her to hold the stock for specific distribution, and preventing her from disposing of it without an order of the court of chancery, no doubt prevented her, to a very great degree, from exercising her judgment in regard to it as she otherwise would have done, or, at least, prevented her from exercising it to the same extent. It appears, by her answer in the chancery suit, that she was aware, through

the purchase-money.—*Held*, that his administrator could collect from her the money due on the mortgage, after her husband's death.

In *Elliott v. Nichols*, 4 Bush 502, a wife's father conveyed lands to her and her husband in 1837. The wife died in 1861, and the husband mortgaged the lands in 1865.—*Held*, that the mortgagees could enforce their mortgage against the entire estate, as against the heirs-at-law of the wife, but had the wife survived her husband, "neither the husband, nor his heirs or assigns, nor the mortgagees, nor even the purchasers under a decretal sale foreclosing the mortgage, could have held against her" (p. 506).

In *Berrigan v. Fleming*, 2 Lea 271, a mortgage on lands standing in the name of a husband and wife, was signed and acknowledged by the husband and wife, but was held invalid to transfer any interest from her because her name was not mentioned in the body of the mortgage. The wife, however, having died pending the foreclosure—*Held*, that the mortgagee was entitled to the benefit of the husband's survivorship. See *Wochosa v. Wochosa*, 45 Wis. 423; *Shroyer v. Nickell*, 55 Mo. 264; *Wales v. Coffin*, 13 Allen 213; *Sim-*

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advice of counsel, of the risk she ran in holding the stock as administratrix, unless authorized or required to do so. It is not at all improbable that under the injunction she regarded herself as free from that liability. She is entitled to allowance for the depreciation. The fact of depreciation seems not to have been disputed. The amount of it, however, appears not to have been established. It may be done here.

As to the next ground of objection: Apart from the testimony of the administratrix, the proof is clear that Dr. Greiner received about \$4,000 of his wife's money in the year 1874. Mr. Parker, the cashier of the Merchants National Bank, testifies that in that year Dr. Greiner brought to him a draft from Germany for about \$4,000, and said it was his wife's money. He says Dr. Greiner asked him to sell the draft for him, and he did so and deposited the proceeds to Dr. Greiner's credit in the bank. It appears that Dr. Greiner asked his advice as to the proper kind of investment for it, and also said he wanted to keep his wife's money separate from his own. The next of kin, while they do not deny that he received the money, insist that it was expended by him in paying off a mortgage upon certain real property in Newark, which he had bought and the title to which he had taken in the names of himself and wife. There is no evidence that that use of the money was authorized or confirmed or even known by her. When he received the money, which was her separate property, he became trustee of it for her, and was bound to account to her for it accordingly. *Vreeland v. Vreeland's Admr.*, 1 C. E. Gr. 512; *Clawson v. Riley*, 7 Stew. Eq. 348.

mons's Estate, 4 Clark (Pa.) 204; *Kip v. Kip*, 6 Stew. Eq. 213, 216; *Petesck v. Hambach*, 48 Wis. 443; *Manigault v. Deas*, Bail. Eq. 283.

In *Burr v. Swan*, 118 Mass. 588, a married woman was held liable on a note signed by her, the consideration of which was labor on land of which she was tenant in common with her husband. See *Hughes v. Anslyn*, 7 Mo. App. 400.

In *Scott v. Claiborne*, 6 Munf. 117, property conveyed in trust for the use of a husband and wife during their joint lives, was held liable to execution to satisfy a debt incurred after the marriage, for supplies furnished for the support of the husband and wife. But see *Tupper v. Fuller*, 7 Rich. Eq. 170; *Brandon v. Brandon*, 14 Kan. 342. Also, *See v. Zabriskie*, 1 Stew. Eq. 422, note.—REP.

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If he applied it to the payment of the mortgage, the land was not her separate property, but belonged to both, and if he had survived her he would have been the sole owner of it as survivor. The payment, therefore, cannot be regarded as one made for the benefit of her separate estate. According to her testimony (which appears to have been given without objection as to its competency on this head), he received the money to invest it in bank or insurance stock for her. There is, then, no error in the decree of the orphans court on this subject. Only part of the exceptions to the final account was sustained, and it was a proper exercise of discretion to direct that the costs, including counsel fees of both sides, should be paid out of the estate. She, it may be remarked in this connection, is by law entitled to one-half of the estate, seeing that there are no children. The costs of the appeals on both sides will be paid out of the estate.

MARY S. MIDDLETON'S EXRS., appellants,

v.

WALTER B. MIDDLETON, respondent.

1. Where an executor allowed a claim for farm produce furnished the testatrix, and the claimant swears positively that he furnished the produce, and that no part of the price has ever been paid, his oath is not overcome by that of one of the next of kin, the exceptant, who swears that the claimant lived with the testatrix, and had no place whereon he could raise the produce.

2. Where two of the next of kin are requested by one of the executors to remain in one of testatrix's houses to take care of it, and they, without agreeing to pay rent therefor, continue in possession until notified to quit, they are not liable for rent of the premises.

On appeal from decree of Union orphans court.

Mr. J. H. Stone, for the appellants.

Mr. F. McGee, for the respondent.

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THE ORDINARY.

To the final account of the executors of Mary S. Middleton, deceased, exceptions were filed, and from the decree allowing them an appeal was taken by the executors. The only errors discussed or insisted upon on the hearing, were those alleged to have been committed in the rejection, by the court below, of an item of discharge, \$88.09, being so much money stated in the account to have been paid to L. Murray Perkins, for farm produce, and the rejection of a claim of \$600, for rent of the testatrix's dwelling-house, in Rahway, claimed to be due from the respondent and his brother, Peter B. Middleton, for their occupation of that house for the two years immediately succeeding her death. This item appears on both sides of the account; on the debit side as so much of the assets, and on the credit side as so much paid on account of the distributive shares of the respondent and his brother Peter. The testatrix was their mother.

As to the Perkins claim, there was no evidence before the orphans court to warrant its rejection. On the one hand, indeed, the respondent testified that Perkins (who is his half-brother) could not have furnished the goods, giving as a reason that the latter had no place on which to raise them, and adding that he lived with his mother at the time when it is alleged the goods were furnished, and that he knows Perkins did not furnish them. But, on the other hand, Perkins swears that his bill for them is correct in every particular, and that no part of it has ever been paid. He testifies substantially that he furnished the goods at the price charged. While the respondent swears, as before stated, that he knows Perkins did not furnish them, he does not state the source of his knowledge, except that he says he lived with the testatrix and she told him the goods were not furnished. His testimony is not of a kind to overthrow the positive testimony of Perkins. It is urged, on the part of the respondent, that the fact that Perkins, according to his own admission, owed the testatrix (his mother) over \$3,000 upon his notes held by her at her death, which debt, he says, was by an

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agreement between him and the rest of her children, canceled, should, of itself, be sufficient ground to induce the court to reject the claim in question. But the terms of the alleged agreement are not before me, and the exception is not for not having collected the notes from Perkins, but for having allowed his debt.

As to the charge of rent: the evidence is, that after the death of the testatrix, one of the executors said to the respondent and his brother Peter, that they had better stay in the house to take care of it. They remained there until they received notice to quit, when they left it. It appears quite clear that they occupied it as care-takers merely. They never agreed to pay any rent, nor did they expect to pay any, and none was ever demanded of them. They quit possession on demand, and were at all times ready to give up possession. From their occupation of the premises, under the circumstances, no agreement to pay rent, or to pay for use and occupation, is to be implied. The charge for rent is therefore erroneous. The court below erred in disallowing the amount of the Perkins claim, but did not err in disallowing the claim for rent. No costs of this appeal will be allowed to either side.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY,
MARCH TERM, 1882.

ADAH A. PUTNAM

v.

LYDIA A. CLARK et al.

Where the court of errors and appeals has rendered a decree after hearing on the merits, and the decree has been entered in the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made to the court of chancery.

On petition for leave to file a bill of review in the court of chancery.

Mr. Cortlandt Parker and *Mr. Charles H. Hartshorne*, for petitioner.

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I. It is proper practice to ask of this court leave to file a bill of review below—the decree below having been affirmed in this court.

The court of chancery cannot, after its decree has been affirmed in this court, grant leave to file a bill of review. *Jewett v. Dringer*, 4 Stew. Eq. 586; *Southard v. Russell*, 16 How. 547; *United States v. Knight*, 1 Black (U. S.) 488. These cases were subsequent to *Martin v. Hunter's Lessee*, 1 Wheat. 304, in which (p. 355) the effect of a final determination of the cause is recognized. See, also, *King v. Ruckman*, 7 C. E. Gr. 551; *Carr v. Green*, Rich. Eq. Cas. 405; *Barbon v. Stearle*, 1 Vern. 416; *Story's Eq.* 408–418; *Haskell v. Raoul*, 1 McCord Ch. 22, 30; *Flower v. Lloyd*, L. R. (6 Ch. Div.) 289.

II. It is no objection that the new evidence is that of a party to the suit (Barrett).

Barrett could have been examined as a witness (had he been found) in the original suit, notwithstanding there were parties suing in a representative capacity. The statute excluding the evidence of a party when others are sued as executors, does not apply when he is not interested in the cause—when he is only a nominal party. *Harrison v. Johnson*, 3 C. E. Gr. 420, 425; *Lanning v. Lanning*, 2 C. E. Gr. 234.

“A plaintiff [in equity] might obtain an order as of course to examine a defendant as a witness, upon affidavit that he was a material witness, and was not interested upon the side of the applicant.” * * * “And it may be obtained *ex parte* as well after as before decree.” 1 Greenl. Ev. § 361; 1 Dan. Ch. Pr. 885, note (ed. 1871).

III. A bill of review is proper when the new evidence is (1) material; (2) not cumulative; (3) shows the decree to be wrong, and that injustice has been done by it, and (4) when the evidence could not by reasonable diligence have been procured before the former decree was made. *Story's Eq. Pl.* §§ 412–414; *Connolly v. Connolly*, 32 Gratt. 657.

1. There can be no question that the new evidence was material.

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2. It is not cumulative. Cumulative evidence is additional evidence of the same kind, on the same point. Here the additional evidence is on the same issue, but it is not of the same kind. The former was circumstantial, the latter direct evidence. *Guyot v. Butts*, 4 Wend. 580; *Platt v. Munroe*, 34 Barb. 291; *Mulock v. Mulock*, 1 Stew. Eq. 21; *Watts v. Howard*, 7 Metc. 478, 480.

The evidence here makes a much stronger case than is necessary for a bill of review. In *Quick v. Lilly*, 2 Gr. Ch. 255, 258, it was allowed when the new evidence made it doubtful only whether the decree was right; and that was stated to be the rule upon which a bill for review would be allowed.

In *Connolly v. Connolly*, 32 Gratt. 657, the confession of the man who had forged the will (previously established by a decree which was now sought to be reviewed) was the new evidence, and the court held that it was not sufficient. This case is exactly parallel with ours upon every point.

4. The evidence of Barrett could not, by reasonable diligence, have been procured before the decree.

IV. A forgery can pass no rights, even to a *bona fide* purchaser. The defence of a *bona fide* purchase can be used only when the purchase was made from one having either (1) an equitable title; (2) a legal title; or (3) was carelessly armed, by the owner, with the evidence of title. *Ruckman v. Decker*, 8 C. E. Gr. 282; *Story's Eq.* 1502-1505, 1510; 2 *White & T. Lead. Cas. Eq.* 32, 45, 46, 61; 1 *Dan. on Neg. Inst.* 634.

Messrs. Collins & Corbin, for respondents.

I. This court has no jurisdiction to grant any relief on the petition of Mrs. Putnam.

This court cannot even review its own decrees. Appellate power is exercised over the proceedings of inferior courts—not on those of the appellate court. *Ex parte Sibbold*, 12 Pet. 492; *Washington Bridge Co. v. Stewart*, 3 How. 413; *N. J. Franklinite Co. v. Ames*, 1 Beas. 510; *King v. Ruckman*, 7 C. E. Gr. 554; *Cox v. Breedlove*, 2 Yerg. 505; *McGregor v. Gardner*,

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16 Iowa 538; *Kimball v. Feldman*, 28 Iowa 497; *Jewett v. Dringer*, 4 Stew. Eq. 593; *Stafford v. Bryan*, 2 Paige 47.

II. There is laches in making this application since the new evidence was discovered.

At law, the applicant must not lose a term after discovery of the new matter.

This applicant has lost two terms, and delayed nine months.

In *Brinkman v. Brinkman* (not reported, decided 1880,) Vice-Chancellor Van Fleet held that a delay of seven months after discovery of the new evidence was fatal to the application to open the decree. See, also, *Warner v. Warner*, 4 Stew. Eq. 55.

III. It does not appear that complainant has any new evidence. *Sheppard v. Sheppard*, 5 Halst. 250. Approved in *Servin v. Cooper*, 4 Vr. 68, 71; *Quick v. Lilly*, 2 Gr. Ch. 257.

The motion for a new trial on the ground of newly-discovered evidence, must be supported by the affidavit of the witness expected to testify to the newly-discovered facts. *Jenny Lind Case v. Bower*, 11 Cal. 194; *Caldwell v. Dickson*, 29 Mo. 227; *Arnold v. Skaags*, 35 Cal. 684; *Ritchey v. West*, 23 Ill. 385.

It has sometimes been said at law that the absence of an affidavit of the new witness, may be explained and dispensed with. *McQueen v. Stewart*, 7 Ind. 535; *Cowan v. Smith*, 35 Ill. 416.

"The application must be based, not upon what the complainant supposes can be proved, but upon what he satisfies the court can be proved." *Long v. Granberry*, 2 Tenn. Ch. 92; *Thomas v. Rawlings*, 34 Beav. 50.

IV. Barrett was not a competent witness at the time depositions were taken in this suit.

He was a party, and Clark's executors were sued in a representative capacity. He is only competent now by reason of a change in the law of evidence. *P. L. of 1880 p. 52.*

A review cannot be granted, because by change of law petitioner can now introduce important testimony which was excluded before. *Berry v. Lisherness*, 50 Me. 118.

The case of an incompetent witness having become competent

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is not newly-discovered evidence to warrant a new trial on that ground. *Sawyer v. Merrill*, 10 Pick. 16; *State v. Bean*, 36 N. H. 122. See, also, *Linn v. Neldon*, 8 C. E. Gr. 169; *Grover v. Wyckoff*, 12 Id. 75.

It is true that, if Barrett was not a proper party, he might have been examined on behalf of a co-defendant by order of the court. *Harrison v. Johnson*, 3 C. E. Gr. 420, 425.

V. The new evidence, even if sworn to, does not warrant a review.

When a new witness is discovered, whose testimony is shown to be unworthy of credit, by facts proved in the former trial, a new trial will not be granted. *Jernigan v. Wainer*, 12 Tex. 189.

The opinion of the court was delivered by

THE CHANCELLOR.

This is an application to this court, by petition, for leave to file a bill of review, on the ground of newly discovered facts, in a cause which was decided here in 1880, on appeal from the final decree of the Chancellor dismissing the complainant's bill. By the decree of this court that decree was affirmed and the record remitted. There is, therefore, no record here now. In my judgment, the application cannot be entertained in this court, but must be made in the court of chancery. It is urged, however, that in *Jewett v. Dringer*, 4 Stew. Eq. 586, where such an application, on the ground of fraud and newly-discovered evidence was made to that court after reversal of the decree on appeal, it was held that it would not entertain an application to file a bill of review, to revise its decision after that decision had been passed upon by this court. That view has, indeed, the countenance of the opinion of Chancellor Walworth, in *Stafford v. Bryan*, 2 Paige 45, a case cited in the vice-chancellor's opinion in *Jewett v. Dringer*, and of the supreme court of the United States in *Southard v. Russell*, 16 How. 547. In the latter case, the court distinctly said that a bill of review will not lie in the case of newly-discovered evidence after the publication or decree

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where a decision has taken place on appeal, unless the right is reserved in the decree of the appellate court, or permission given on an application to that court, directly, for the purpose. But it will be found that those decisions have neither the authority of the books nor of adjudged cases for their support. The court of chancery has inherent power, without the consent of the appellate tribunal, to review, on the ground of newly-discovered evidence, its decree, though it has been passed upon on appeal, and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the supreme court shall have been obtained. These propositions are established by the following citations: *Needler v. Kendall*, (1 *temp. Finch* 468; *Mitf. Pl.* 88; *Cooper's Pl.* 92; 2 *Dan. Ch. Pr.* 1579; *Story's Eq. Pl.* §§ 408, 418; 2 *Hoff. Ch. Pr.* 1; *Tommey v. White*, 1 *H. of L. Cas.* 160; *Flower v. Lloyd*, L. R. (6 *Ch. Div.*) 297; *Haskell v. Raoul*, 1 *McCord's Ch.* 22; *Perkins v. Lang*, reported in a note to that case, and *McCall v. Grant*, 1 *Hen. & Munf.* 13. It must be borne in mind that there is a distinction in practice between an application for a review on the ground of error on the face of the decree, and one based on newly-discovered evidence. In the former, no bill of review can be filed after the decree has been passed upon by the appellate tribunal, but in the latter it is otherwise. "Where a decree" says Judge Story, "has been affirmed in parliament, may well be doubted whether a bill of review for errors, apparent upon the face of the decree, can be brought; for the highest appellate court has pronounced, in effect, that it is not erroneous. The same objection does not apply where the bill of review is for matter of newly-discovered evidence." In the ancient case of *Needler v. Kendall*, cited above, there was a bill of review apparently for newly-discovered facts, after a decision of the cause on appeal, and it is evident, from the report, that no leave of the appellate court was deemed necessary. In the recent case of *Flower v. Lloyd*, L. R. (6 *Ch. Div.*) 297 (1877), the plaintiffs obtained a judgment which was reversed on appeal. After the order on appeal was passed and entered, the plaintiffs applied to the appellate court to have the appeal reheard with new evidence.

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dence. It was held that that court had no jurisdiction to rehear the appeal. Sir George Jessel, M. R., speaking on the subject of the practice said, "There was another totally different class of cases, where you discovered subsequent matter which showed that the decree was wrong, although there had been no fraud in obtaining it. That was called a supplemental bill, in the nature of a bill of review, which brought the new matter forward, and again enabled the court to do justice and get rid of the original decree. That always required leave. Now, that being so, supposing the court of appeal has no jurisdiction to do what is now asked, there would be means of obtaining justice by an original action, which either would or would not require the leave of the court, according to circumstances. But the leave to be given, when required, was always to be obtained from the court in which the bill was filed, or in which the action had been brought." As before stated, it was held in that case, that the appellate tribunal (the court of appeal, under the judicature act), having once determined the appeal, had no further jurisdiction. And this court has so held, also. In *King v. Ruckman*, 7 C. E. Gr. 551, Chief-Justice Beasley, in delivering the opinion of the court, said: "But I also think, that when such judgment [the judgment of this court on appeal] has been rendered, after a hearing on the merits, and has been entered on the minutes, in accordance with the views of the court, and the record has been regularly remitted to the inferior court, this court has no further jurisdiction in the case." It is interesting to note, also, that in *Legg v. Overbagh*, 4 Wend. 188, it was held by the court for the correction of errors of New York, Chief-Justice Savage, Chancellor Walworth and Justice Sutherland all expressing concurrence, that where a *remittitur* had regularly issued, and the proceedings had been sent down to the court below, the appellate court had no longer any control over the cause; that the court below had become possessed of it, and the jurisdiction of the appellate tribunal over it had ceased; but that it was otherwise when the *remittitur* had issued irregularly, in which case, the cause remained in the court of appeal, in contemplation of law, and the

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order or decree would, of course, be superseded; the *remittitur* in such case, being regarded as not the act of the court. While the record still remains here, leave to apply to the court below may be given, as justice may require. As in *Hoboken Bank v. Beckman* (1881), where the whole of the evidence in the cause, on the part of the defendants, had not, through an oversight, been submitted to the chancellor, this court remitted the cause, in order that it might be reached. And in *O'Brien v. Hulfish*, 7 C. E. Gr. 471, the affirmance was without prejudice to an application to be made to the court below to modify, open, or set aside the decrees so as to reach the merits. But when the record is regularly gone, this court has no jurisdiction to make any order in the cause. Upon the two cases above mentioned as holding the contrary doctrine, *Stafford v. Bryan*, decided by Chancellor Walworth, and *Southard v. Russell*, decided by the supreme court of the United States, it may be remarked that in the first, the bill was dismissed and the complainant appealed. Pending the appeal, he, having obtained newly-discovered evidence, applied to the appellate court to stay the hearing in that court until he could apply to the court below for leave to file a supplemental bill in the nature of a bill of review, to obtain the benefit of the newly-discovered evidence. The leave was refused and the decree affirmed. On the filing of the *remittitur*, the motion for leave to file a bill of review was made in the court of chancery, so that the very application passed upon in the court below had been unsuccessfully made in the court of appeal. In the other case, no objection was made by counsel, on the ground that the bill of review had been filed without leave of the appellate tribunal, but that objection was suggested by the court itself, after it had disposed of the cause on the merits. The point was not discussed by counsel. The application under consideration is denied, with costs.

Petition unanimously dismissed.

Elizabethtown Savings Institution v. Gerber.

THE ELIZABETHTOWN SAVINGS INSTITUTION, appellant,

v.

JAMES J. GERBER, assignee &c., et al., respondents.

1. An order made by force of the New York code, upon a debtor of a defendant, on a judgment to pay the debt due to the plaintiff in the judgment, in part satisfaction thereof, will be held to be conclusively binding in this state.

2. And if the debt so ordered to be paid were in the custody of the court of chancery, such foreign order of judgment would lay in itself a ground for a bill seeking such money.

3. But where such moneys were in the hands of a corporation of this state, and it appeared that such corporation was not cited in the proceeding in New York, and did not appear therein, such foreign order requiring it to pay said moneys, such order was void.

4. Query—Whether moneys can be attached in a foreign state in the hands of a litigant in the courts of this state, when the time for pleading, on the part of such litigant, has expired.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Elizabethtown Savings Inst. v. Gerber*, 7 Stew. Eq. 130.

The appellant, the Elizabethtown Savings Institution, obtained judgment in New York against one Ahern. In proceedings on this judgment an order was made by the New York court that the Esterbrook Steel Pen Manufacturing Company, or its agent, should appear and be examined touching its alleged indebtedness to Ahern. This proceeding was taken by virtue of the New York code, and it having appeared, by an examination of this company, that it was indebted to Ahern in an amount that was being ascertained in the court of chancery of this state, an order was made by the New York judge that the Esterbrook, who was the secretary of said pen manufacturing company, should pay to the appellant any amount which might be due to said Ahern from said pen company, up to the amount

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of said judgment, and forbidding him from paying the same to said Ahern, or to any one for him.

The Esterbrook Steel Pen Manufacturing Company was a corporation of this state, having a place of business in New York.

In the suit in chancery in this state between the pen manufacturing company and Ahern a certain amount was found to be due from the former to the latter, and which amount has been paid into court, the bill in the present case was filed by appellant to reach that fund.

Mr. Hamilton Wallis, for appellant.

I. The supreme court of the state of New York had jurisdiction to make the order upon which our bill was based. *Molin v. Insurance Co.*, 4 Zab. 222; *Camden &c. Mill v. Sweet Iron Co.*, 3 Vr. 15.

II. This order of the supreme court of New York must be enforced by the courts of this state. *Lynch v. Johnson*, 48 N. 27; *Allen v. Staning*, 26 How. Pr. 57; *Home Ins. Co. v. Howell*, 9 C. E. Gr. 238; *Bidlack v. Mason*, 11 C. E. Gr. 23; *Gifford v. Thorn*, 1 Stock. 721, 722.

III. If not otherwise entitled, this order is an agreement in law between the pen company and Ahern for the payment of this debt to the appellant; such agreement creates a trust in favor of the appellant, which the courts in this state will enforce. *Mahaney v. Parman*, 4 Duer 606, note; *Barnes v. Smith*, Abb. Pr. 420; *Parker v. Mygridge*, 2 Story 334.

IV. The defendant Gerber, as to this fund, stands exactly in the position of Ahern; he has no better claim than Ahern has. *Cook v. Tullis*, 18 Wall. 332; *Kelly v. Scott*, 49 N. Y. 595.

Mr. William P. Wilson, for respondent.

I. The bill on this cannot be sustained, for the reason that there is no lien on the money in controversy, equitable or otherwise,

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existed by virtue of the order of the New York court. *Mellville v. Brown*, 1 Harr. 364; *Edgar v. Clevenger*, 1 Gr. Ch. 258; *Young v. Frier*, 1 Stock. 465; *Swayze v. Swayze*, 1 Stock. 273; *Bigelow Blue Stone Co. v. Magie*, 12 C. E. Gr. 392.

II. The right to whatever money was decreed to be paid by the Esterbrook Steel Pen Company vested in Gerber, the assignee of Ahern, on April 3d, 1878, and cannot be divested by a decree made June 25th, 1878. *Esterbrook Steel Pen Mfg. Co. v. Ahern*, 3 Stew. Eq. 343.

III. The fund in this case cannot be reached by bill in chancery. *Rev. p. 120*; *Hardenburg v. Blair*, 3 Stew. Eq. 656.

IV. The New York court had no jurisdiction over the personal property of the pen company, which was a New Jersey corporation, and had an office here.

V. The order upon which the bill is founded is impotent to transfer or touch any debt or obligation of the corporation to Ahern.

The opinion of the court was delivered by

BEASLEY, C. J.

The argument of the counsel of the appellant was rested on this basis of fact, that the appellant, having obtained a judgment against Ahern in the city of New York, in aid of that proceeding duly attached certain moneys due to him from the Esterbrook Steel Pen Manufacturing Company, and obtained a judicial order in the New York court that this latter company should pay the moneys thus due in satisfaction, *pro tanto*, of the appellant's judgment, and that the moneys in question were in the custody of the court of chancery of this state. If this constituted the exact truth of this case, as it is contained in the bill of the appellant, I see no reason to doubt that the present suit would be entitled to succeed. The New York code authorized a proceeding against debtors of the judgment debtor, to the effect that such debtors be ordered to pay the sums due from them to

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the judgment creditor in satisfaction of his claim. Such a provision is not, in its general nature, unlike our attachment act, and, in point of legality, appears to be unexceptionable. Nor does there seem to be any reason to question that such a judicial order requiring the application of such moneys to the satisfaction of the judgment, would be enforceable not only within the jurisdiction in which it was rendered, but also in every other state. In this case it is true that the Esterbrook Steel Pen Manufacturing Company, that was made the garnishee in this case, was a corporation of this state, but it had a place of business, and an officer representing it, in New York, and thus was liable to be brought under the jurisdiction of the courts of that state with respect to a matter of this kind, quite as much so as though it had been an individual having his domicile here, but being present and served with notice in New York. Regarding, therefore, this corporation as legally present in that state, and as duly served with process, and as having been adjudged to pay this money to the appellant, such a course of law would be as binding here as it would be in the state in which it occurred. The court rendering such a decision would have cognizance over the cause and over the person, and upon general legal rules, a judgment so founded would be operative everywhere in this country. The present order is in the nature of an equitable procedure, and no doctrine is more fixed than the principle that a court of chancery, having jurisdiction over the person, and the cause being one of equitable cognizance, will exert its authority, no matter where the property in dispute is situated. An exercise of such a power is to be found in the noted case of *Peru v. Lord Baltimore*, 1 Ves. Sr. 444, in which Lord Hardwicke decreed the specific performance of articles concerning the boundaries of two provinces in America. The decisions are numerous to this same purpose. 3 Lead. Cas. Eq. 767. The question of authority and jurisdiction being conceded, it follows that the resulting decision must be conclusive, and, by force of the national constitution and legislation, must be as effectual in this state as it is in the state of New York. Nor, assuming the foregoing premises, would a case be presented in which it

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would be necessary that a judgment in this state should be obtained in order to lay a foundation for an appeal to equity. Such a course is indispensable in those instances where the fact that a judgment exists which is not available at law, constitutes the only ground of an appeal for the assistance of a court of chancery, as, for example, when a creditor seeks to set aside the voluntary or fraudulent conveyances of his debtor. But in such a case as the present the nature of the judgment confers an equity which in itself will support the proceeding requisite to vindicate and enforce it. A judicial order that the garnishee owes a debt to the defendant in the judgment, and that such debt be paid over to the plaintiff in the judgment, such moneys being in the custody of a court of equity, creates, *per se*, a right to apply to such court for such moneys, in the same way as an assignment of such moneys from the party owing them to the plaintiff in the judgment would have created. Such a decree finally settles the plaintiff's right to such fund, and that right is an equitable one. Such a right, in my opinion, could be enforced in this state by a bill in equity properly framed.

But although, as I have said, the above-stated facts formed the ground of the argument of the counsel of the appellant, they are not the facts upon which the decision of this court must be based. The appellant has stated his case in his bill, and, by well-settled rules, he cannot ask for relief except on the foot of such statement. From that presentation of facts, it is not easy to comprehend how it can be plausibly claimed that the appellant has obtained any lien upon or claim to the fund which is here in dispute. The defect in the case made in this bill is, that it utterly fails to show that the Esterbrook Steel Pen Manufacturing Company has, by the judicial order made by the judge in New York, been required to pay this money to the appellant. Indeed, it does not appear from the bill that this corporation was in any wise connected with the proceedings ancillary to the New York judgment. What appears is this: After showing the judgment obtained against Ahern, and that Esterbrook was the secretary and managing agent of the pen manufacturing company, with an office in New York city, the bill proceeds as follows:

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"That at or about the time last aforesaid, your orator, pursuant to the laws of the state of New York, applied to and obtained from one of the justices of the supreme court, an order requiring said Esterbrook, as such officer, to make discovery of what, if anything, was due to said Ahern from said pen company; that afterwards said Esterbrook was duly examined before said court, by its proper officer, under said order, and that, on or about the second day of March, in said year, an order was duly made and entered in said action in said supreme court, requiring said Esterbrook, as such officer, to pay to your orator any amount which might be due to said Ahern from said pen company, up to the amount of said judgment, and forbidding him from paying the same to said Ahern, or to any one for him."

The foregoing statement constituted the entire claim of the appellant to the moneys in question. The corporation is alleged to owe the money, and, as far as appears, without notice to such corporation, one of its agents is cited to appear before a judge, and is examined, and an order made that he, the agent, pay the money of the corporation to the plaintiff in the judgment. Such an order, so far as the corporation is concerned, is void upon its face, because the judge making the order had not acquired jurisdiction over the corporate body, and, in point of fact, according to the statements of the bill, he has not attempted to bind it by his decision. It is not necessary to cite authorities to show that a judgment rendered in one state will not be enforced in the courts of another, when it affirmatively appears that such judgment was rendered in the absence of jurisdiction over the person and cause of action. That doctrine has been announced in several decisions of the courts of this state. According to his own showing, the appellant had no claim whatever to the moneys in dispute, and, consequently, his bill was properly dismissed by the vice-chancellor.

And it should also be observed that, in addition to this infirmity in the appellant's case, inherent in the mode in which he has presented it, there is another difficulty which, in the nature of the transaction, was, it may be, invincible. As the case was circumstanced, it may well be doubted whether this debt due from the pen manufacturing company was attachable by virtue of the New York process. The quality of the affair that gives rise to this question consists in the circumstance that, at the time of

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such attempted seizure, the claim was in the course of judicial decision in this state. The bill in chancery between the pen manufacturing company and Ahern was filed in 1876, and the order to appropriate these moneys embraced in that suit was made by the New York court in 1878, so that the time for pleading in the former proceeding had expired before the foreign order came into effect. It therefore followed that, in the orderly sequence of events, the domestic and the foreign judgment would of necessity conflict and stand in direct opposition to each other; for, by the decree in chancery in this state, the pen manufacturing company would be ordered to pay these moneys to Ahern, while, by the judicial mandate of the New York judge, it would be forbidden from paying them to that person. Inasmuch, therefore, as the judicial cognizance upon the subject of litigation had attached in the court of this state before any attempt was made to put it *sub judice* in the foreign jurisdiction, the inquiry is whether such attempt was, upon legal principles, legitimate. A negative response to this question is to be found in the case of *Shinn v. Zimmerman*, 3 Zab. 150. That was a case in which an attachment in this state had been levied on moneys due from a defendant in a judgment obtained in Pennsylvania, the plaintiff in such judgment being the defendant in attachment. The decision of the court was, that, under the conditions of fact stated, such a debt was not attachable. In explaining the reasons for this result, Chief-Justice Green uses this language: "Upon a question of conflict of jurisdiction, it is clear that the court which first acquires jurisdiction of the subject-matter of controversy is entitled to exercise it, and to enforce the execution of its own judgment. If the court in Pennsylvania permit the attachment to supersede the execution, it would, in effect, permit the process of the courts of this state to interfere with the execution of its own judgment. It is obvious, moreover, that if executions may thus be arrested, it would, in respect to judgments in this state, as well as elsewhere, present a ready mode of embarrassing the administration of justice and delaying the process of the courts."

It will be observed that if the proceedings in the court which has acquired the right of primary jurisdiction have proceeded so

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far that the defendant in such action is so placed that he has opportunity to plead the circumstance of the foreign attachment; the principle adopted in the case just cited becomes applicable for the judgments which must result in the former and the latter case necessarily will assume the form of contradictories.

Thorndike v. De Wolf, 6 Pick. 120, the court said that "trustee process shall be served before the party summoned shall be concluded by the state of the pleadings against showing defence that the debt or property is attached in his hands."

The question thus alluded to is one of interest and importance, but one which it is not necessary, at the present time, to decide, it being thus referred to merely for the purpose of excluding such inferences as might be drawn from the silence of this court upon the subject.

The decree should be affirmed, with costs.

For affirmance—BEASLEY, C. J., DEPUE, KNAPP, PARKER, REED, VAN SYCKEL, CLEMENT, COLE, GREEN, WHITAKER 10.

For reversal—DIXON—1.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY
complainants,

v.

ELIAS A. WILKINSON et al., defendants.

1. The giving of a bond as collateral security to a subsisting bond and mortgage, does not, *per se*, and in the absence of any ancillary agreement, operate as a suspension of the right to prosecute such bond and mortgage.

2. A surety of the mortgagor will not be released by the mere giving of such collateral bond.

Ebenezer M. Crosby executed a bond and mortgage to the complainant to secure \$1,000, and then conveyed the premi-

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to **David B. Crockett**, who, as part of the consideration, assumed the **payment** of said mortgage. Crockett mortgaged, in his turn, the premises so purchased, and this mortgage was subsequently foreclosed without the first mortgagee being made a party. At the sheriff's sale, in this proceeding, Wilkinson, the respondent, became the purchaser, and thereupon, as the bill states, made his "collateral bond" to the appellant to secure the **payment** of the same indebtedness secured by the mortgage first above mentioned, being in the penalty of \$2,000, "conditioned for the payment of \$1,000 in one year from its date, with interest at seven per cent. per annum, payable half-yearly, together with all taxes." Wilkinson then conveyed the premises to **Joseph Liebstein**, who assumed the payment of the mortgage as part of the consideration-money, who conveyed to **Sarah H. Riker**, on similar conditions, who conveyed to **Louis Stern**, who also assumed "the payment of said mortgage." In addition to this assumption, Stern, after his purchase, executed to the complainant "his collateral bond" "to secure the payment of said mortgage indebtedness, said bond being made in the penal sum of \$2,000, conditioned for the payment of \$1,000 in one year from the date thereof, with interest thereon."

The bill was for the foreclosure of the mortgage and for a decree for the deficiency against Crosby, Crockett, Wilkinson, Liebstein, Riker and Stern.

On appeal from a decree of the chancellor, based on the following opinion of Amzi Dodd, esq., advisory master:

Bill filed February 25th, 1880, to foreclose a mortgage for \$1,000, dated September 2d, 1870, made by Ebenezer M. Crosby and wife to the complainants, to secure Crosby's bond of same date and amount. Under the foreclosure of a subsequent mortgage, without reference to the prior one by Crosby, the mortgaged premises were conveyed by the sheriff to Elias A. Wilkinson, by deed of April 4th, 1873, subject to the first mortgage of \$1,000. Wilkinson then gave to the complainants his bond, dated May 2d, 1873, conditioned for the payment of \$1,000, payable in one year, being the same debt secured by the mort-

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e. By deed of March 30th, 1874, Wilkinson and wife conveyed the premises to Joseph Liebstein, subject to said mortgage, which Liebstein assumed, by said deed, to pay and discharge, as so much of the consideration in the conveyance to him. By deed of April 27th, 1874, Liebstein and wife conveyed the premises to Sarah H. Riker, subject to said mortgage, which she assumed in like manner to pay and discharge. By deed of August 14th, 1874, Sarah H. Riker conveyed the premises to Louis Stern, subject to the mortgage which Stern in like manner assumed to pay and discharge. Stern, as such owner, gave to the complainants his bond, dated March 1st, 1875, conditioned for the payment of \$1,000 in one year thereafter, the said moneys being declared in the bond to be the same mentioned in the bond of Crosby aforesaid, dated September 2d, 1870, and the bond of Stern collateral thereto.

The bill prays a decree for deficiency against Stern, Riker, Liebstein, Wilkinson and Crosby.

Wilkinson is the only answering defendant.

The only disputed point is the liability of Wilkinson to a decree for deficiency. At the argument, his liability was controverted, on the ground that Stern having in 1874 become the purchaser of the mortgaged premises, and having assumed to pay the mortgage debt as so much of the purchase-money, the complainants extended the payment of such debt by taking Stern's bond of March 1st, 1875, payable in one year, and thereby discharged Wilkinson, who was in equity only a surety, by giving time to Stern, who was the principal.

The jurisdiction of equity to decree the payment of deficiency by Wilkinson is derivable only from the statutory enactment of 1866 (*Rev. p. 118 § 76*), as follows:

"That it shall be lawful for the chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of mortgage debt, above the net proceeds of the sales, by any of the parties such suit who may be liable, either at law or in equity, for the payment of the same."

By an act approved March 12th, 1880 (*P. L. of 1880 c. 255*), this enactment was repealed as to foreclosure suits there

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commenced, but the repealer does not apply to the present suit begun February 25th, 1880. No doubt was intimated at the argument as to the competency of this legislative addition to the jurisdiction of chancery, nor as to whether, under the terms of the enactment, it was made the duty of this court to enforce legal obligations not previously within the scope of its cognizance.

The single question presented for decision does not seem to me one of difficult solution. I am of opinion that Wilkinson was discharged in equity by the action of the complainants, and that for that reason they are entitled to no decree against him for deficiency.

By conveyance of August 14th, 1874, from Sarah H. Riker to Stern, the latter assumed to pay the mortgage, and so became in equity the principal debtor, and Wilkinson his surety. *Klapworth v. Dressler*, 2 Beas. 62; *Hoy v. Bramhall*, 4 C. E. Gr. 563; *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650.

This being the relation between Wilkinson and Stern, the holders of the debt and mortgage security took the bond of March 1st, 1875, by which the moneys secured thereby are expressly declared to be the same secured by their mortgage, and by which, without Wilkinson's consent, they extended payment by Stern for one year. How can it be said that this did not bar the complainants from foreclosing the mortgage during the extended time, and if it did, how can it be said that his suretyship continued? To hold that it did, would be, I think, in manifest violation of the settled principles of suretyship, too well established and familiar to call for citations to support them.

The case of *Calvo v. Davies*, decided by the court of appeals of New York, in 1878, and reported in 73 N. Y. 211, is substantially the same as this. Calvo held the bond and mortgage of Davies; Davies conveyed the mortgaged premises to Leslie, who assumed in the conveyance to pay the mortgage. Calvo then made an agreement with Leslie, extending the time for the payment of the principal sum, with the express understanding that the bond and mortgage should remain in every other respect unaffected by said agreement. It was held by the court that the mortgage

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could not be enforced during the time covered by the agreement either by Calvo, the holder, or by Davies, the original debtor and obligor; that Davies, on paying the debt, would be entitled to be subrogated to the security, but he would stand in the place of the creditor, and would take the mortgage subject to the agreement. It was said that it would be a forced and unnatural construction to hold that the parties designed to reserve to the creditor a right to proceed at once against Davies, which would enable Calvo to defeat the sole purpose of the agreement.

In the present case, no indication exists of any intention to reserve the right of Wilkinson, the surety. Nothing can be inferred in that direction from the words in the bond of Stern stating it to be collateral to the bond of Crosby, the original obligor and mortgagor. Where an additional or collateral security is given by the principal debtor, and the time thereby extended for the payment of the original debt, it must clearly appear that the rights of the surety were reserved, otherwise the security will be discharged. There is no authority to the contrary of this, and very many in its support. The supposition that the complainant, or the defendant Stern, intended or expected, when the latter executed his bond agreeing to pay the principal secured by the mortgage in one year from date, with interest half-yearly, that Wilkinson was to have the reserved right to pay the mortgage and enforce it at once against Stern is without any support in the proofs, and altogether unreasonable and improbable, in view of the circumstances and purpose of the parties.

Mr. H. C. Pitney, for appellant.

The learned vice-chancellor held Wilkinson discharged from his express legal liability to pay the mortgage debt in this case on the ground that complainant had given time to Stern, who occupied the position of principal debtor for the amount, thereby depriving him, Wilkinson, of his right as surety to proceed at once against Stern.

The principle upon which sureties are discharged in such cases is that the creditor has intentionally done some act which

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deprived the surety of some remedy or indemnity which he had in the premises, and it was assumed by the learned vice-chancellor that complainant had extended the time of payment of the debt by the principal debtor, and had thereby deprived Wilkinson of the right to proceed against the property pending the extension.

I. The complainant did not extend the time of payment to Stern, the principal debtor.

The "giving of time" in such a case must be accomplished by a valid contract for a sufficient consideration between the creditor and debtor, by which the creditor, for a sufficient consideration, agrees to forbear and give time for payment for a definite period to the debtor.

A mere agreement, without consideration, is insufficient.

An agreement to give time generally, and not for any definite period, is insufficient.

A mere giving of time without agreement is insufficient.

The agreement must be such as to furnish a defence to an action to enforce and collect the indebtedness, otherwise it is harmless and does not injure the surety.

There must be another element in the transaction in order that the surety may avail himself of it as a defence, viz., the creditor must have known at the time that the relation of principal and surety existed, and be conscious that his act will tend to injure the surety.

Pring v. Clarkson, 1 B. & C. 14; *Shubrick v. Russell*, 1 Desauss. 315; *Green v. Warrington*, 1 Desauss. 430; *Two-penny v. Young*, 3 B. & C. 103; *Emes v. Widdowson*, 4 Carr. & Payne 151; *Wyke v. Rogers*, 1 De G., McN. & G. 408; *Overend, Gurney & Co. v. Oriental Financial Cor.*, E. & I. App. (7 H. of L.) 348; *Swire v. Redman*, L. R. (1 Q. B. D.) 536; *Niemcewicz v. Gahn*, 3 Paige 613, 11 Wend. 312; *Elwood v. Diefendorf*, 5 Barb. 398; *Remsen v. Graves*, 41 N. Y. 471; *Cary v. White*, 52 N. Y. 138; *United States v. Hodge*, 6 How. 279; *Weakly v. Bell*, 9 Watts 273; *Bank v. Potius*, 10 Watts 148; *Stow v. Reformed Church*, 39 Pa. St. 226; *Wade v. Staunton*, 5 How. (Miss.) 631; *Brengle v. Bushey*, 40 Md. 141; S. C.,

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17 *Am. Rep.* 586; *Hays v. Wells*, 34 *Md.* 512; *Austin v. Curtis*, 31 *Vt.* 64. In this case all the authorities on both sides are cited and elaborately discussed. The case is well worthy examination. *Brandt on Suretyship* §§ 319, 320; *Baylies on Sureties* 258, and cases cited; 2 *White & T. Lead. Cas.* (ed. 1877) 1915, 1916; *Pitman on Principal and Surety* *20; *Morgan v. Martein*, 32 *Mo.* 438, 444; *Weller v. Ranson*, 34 *Ill.* 362; *Paine v. Voorhees*, 26 *Wis.* 522; *Burke v. Cringer*, 8 *Ind.* 66; *Adams v. Logan*, 27 *Gratt.* 201.

II. In order that the giving of time should have the effect of discharging a surety, it must appear affirmatively that the creditor had notice of such relation. *Niemcewicz v. Gahn*, 1 *Ill.* 419; *Elwood v. Diefendorf*; *Kaighn v. Fuller*, 1 *McCart.* 419, 420; *Am. Lead. Cas.* (ed. 1857,) 411; 2 *White & T. Lead. Cas.* (ed. 1877) 1918; *Baylies on Sureties* 256; *Brandt on Suretyship* § 328; *Hollier v. Eyre*, 9 *Cl. & Fin.* 1, 51, 52; *Poole v. Hardine*, 7 *E. & B.* 431; *Greenough v. McClelland*, 2 *E. & B.* 424; *Hoy v. Bramhall*, 4 *C. E. Gr.* 563, 571, 572; *Swiner v. Redman*, *L. R.* (1 *Q. B. D.*) 541, 542.

III. Wilkinson was not a surety for Stern in such a sense as to entitle him to find fault with the dealings between complainant and Stern. Whatever of the relation of principal and surety existed between Stern and Wilkinson, arose out of the peculiar circumstances of the assumptions of the mortgages, and did not result in changing Wilkinson's relations with complainant. The relations between complainant and Wilkinson are determined by the contract between them, viz., Wilkinson's bond. *Meyer v. Lathrop*, 10 *Hun* 66, 73 *N. Y.* 315.

Mr. Frederic Adams, for appellant.

I. The construction of the bond of Louis Stern.

The question here is this—

Does the bond of Stern contain a contract by the company to extend the time for paying the mortgage?

It is impossible to read the bond of Stern without seeing

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things: *first*, that it is the contract of Stern rather than the contract of the company; and *secondly*, that it does not purport to be a contract extending the time for the payment of a mortgage. It professes to be an obligation collateral to a certain bond and mortgage, but it nowhere declares an intention to change the terms of that bond and mortgage. Its function is to fortify, not to alter. On its face it is an instrument given for no other purpose than to further assure the mortgagees, whose mortgage was long past due, by adding to their securities the right to resort, after one year, to the personal responsibility of the owner of the equity of redemption. There is nothing to show that the company meant to change the terms of the mortgage, or that Stern wished them to do so, or that either of them had any intent, which is not fully expressed in the bond.

The court are referred on this point to the authorities, which are fully cited and discussed in the brief of the senior counsel for the appellants.

II. If the court should be of opinion that it is not so, but that the bond of Stern is an agreement on the part of the company to extend the time for paying the Crosby mortgage until one year after the date of Stern's bond, then it will become necessary to consider the further question as to the effect of this bond upon the respective rights and obligations of the company and Wilkinson.

This is a question not so much of law as of the application of law.

It is thoroughly settled that a contract by which a surety is bound, cannot be altered in any material respect by the creditor and the principal debtor, even to the apparent advantage of the surety, without discharging the latter, unless he consents to the alteration. This rule is necessary for the protection of the surety; the peculiarity of the case being that the creditor and the principal debtor have the legal power to change a contract on which another person is liable. If the responsibility of the latter survives such alteration he must stand to a contract by which he never agreed to be bound. The law avoids this unjust

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result by making the consent of the surety a prerequisite to continuance of his liability under the new contract, and it refused to go into the question whether the new contract is better or worse for the surety than the old one. It is enough if the original contract has been altered.

The elements of a case to which this rule is applicable are these :

There must be three persons, a creditor, a principal debtor and a surety, and they must be connected by the contractual terms of a common agreement, which the creditor and the principal debtor have the power to alter, and which they do alter, so as to change the situation of the surety. *Miller v. Stewart*, 4 Wash. C. C. 26, 9 Wheat. 680 ; *Samuel v. Howarth*, 3 Meriv. 271 *Manufacturers Bank v. Dickerson*, 12 Vr. 448.

The question is how far this familiar legal rule applies to the equities of such a case as this.

Three things strike the mind at once.

First. The question is new in this state. The rule is, therefore, to be cautiously applied.

Secondly. The parties are not connected by the contractual terms of any common agreement. Wilkinson and Stern are joined together by a mere concatenation of equities, which define the rights *inter sese*, but do not, necessarily, measure their responsibility to the complainants.

See the cases cited by the advisory master.

Thirdly. The contract which Wilkinson seeks to escape from is not his assumption, but is his bond. The complainants hold Wilkinson exactly as they hold Crosby, not through a roundabout subrogation, but on his specialty given directly to them. If he had merely assumed the payment of the mortgage the case would be different. The right of the company to hold Wilkinson would then be not original, but derivative ; secondary, not primary—a mere equity, arising out of the acts of third persons and inuring to the benefit of the complainants, by reason of their equitable claim to enforce the collateral securities of their debt and not a full legal right, created and defined by a contract under seal, to which they are parties. Such a mere equity can, with

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the consent of the mortgagee, be extinguished by reconveyance, as in *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650, or by mutual releases, as in *Youngs v. Trustees for the Support of Public Schools*, 4 Stew. Eq. 290. See, also, *Meyer v. Lathrop*, 10 Hun 66.

III. The respondents do not show that the company had notice that Stern and Wilkinson were principal and surety.

Where a surety claims relief on the ground that, without his consent, the creditor has given time to the principal debtor, he must show, in order to entitle himself to exemption from liability, that the fact of suretyship was communicated to the creditor. The privilege of the surety is a mere equity, and binds only those who have notice of its existence. *Kaighn v. Fuller*, 1 McCart. 419.

Actual notice or knowledge there was none. Nor was there constructive notice, unless it arose from the record, and from Stern's declaration to the treasurer of the company that "he had bought the property." It may be said that this put the company on inquiry, and brought them within the rule that possession of land is notice of the possessor's title, and that notice of a deed is notice of its contents. *Van Keuren v. Central R. R. Co. of N. J.*, 9 Vr. 167; *Smallwood v. Lewin*, 2 McCart. 60

But there are two answers to this, either of which is satisfactory.

First. The relation of the parties was not such that inquiry was the duty of the company. The record of a deed is notice only to those who claim through or under the grantor. *Losey v. Simpson*, 3 Stock. 246. A mortgagee, as such, is not bound to follow the title of his mortgagor. *Cogswell v. Stout*, 5 Stew. Eq. 240. The attitude of the company is analogous to that of the holder of a prior mortgage, as to whom it is well settled that the recording of a second mortgage will not be constructive notice of its existence. *Blair v. Ward*, 2 Stock. 126; *Vanorden v. Johnson*, 1 McCart. 376; *Hoy v. Bramhall*, 4 C. E. Gr. 572; *Ward's Exrs. v. Hague*, 10 C. E. Gr. 397; *Woodward v. Woodward*, 1 Stew. Eq. 124.

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But, *secondly*, even if the company are chargeable, by reason of Stern's verbal declaration of ownership, with notice of assumption, this falls short of knowledge that Stern was liable as principal, and, much more, that Wilkinson was bound as surety. To make the promise of a grantee to pay a mortgage on land conveyed to him available to the mortgagee, it must be made to a person who is himself liable for the mortgage debt. See *Wise v. Fuller*, 2 Stew. Eq. 257; *Norwood v. De Hart*, 3 Stew. Eq. 412.

The late, well-considered case of *Cogswell v. Stout*, 5 Stew. Eq. 240, shows that the theory of constructive notice is in disfavour. Indeed, when carried to the length which the exigency of the respondent's case requires, this doctrine has a grimly humorous aspect. It is a familiar maxim that ignorance of the law is no excuse, common among lawyers, excuses no layman, but it has hitherto been supposed that knowledge of the facts is inexcusable. Or that a court of equity will, by a course of artificial reasoning, impute to a person a knowledge of his rights, which is not in his mind, and then, because of that knowledge, take those rights away.

Messrs. Guild & Lum, for respondent.

The bill of complaint shows that while the appellants (who were the complainants below) held the matured bond of the defendant Wilkinson, secured by mortgage, the complainants took the same from Louis Stern, who had purchased the premises and had assumed payment of the mortgage, his bond for the same debt being payable in one year thereafter, with interest &c.

The deed to Stern, at the time of taking the bond, was duly recorded, and Stern (as appears by the evidence of complainants' secretary) had notified the complainants that he had purchased the premises.

The bill alleges "and your orators expressly charge that by the execution and delivery of said collateral bond, the said Louis Stern became bound at law and in equity to your orators to pay the amount due and to become due on said mortgage.

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The taking of the bond was without the knowledge or consent of Wilkinson.

Complainants seek a decree for any deficiency &c., against Wilkinson and Stern.

We contend that, by the taking of Stern's bond, the time of payment of the mortgage debt was extended, to the prejudice of Wilkinson, who then occupied the position of a surety for the debt, and that Wilkinson was thereby discharged from liability for the debt.

The vice-chancellor (Dodd) so advised, and from the decree advised by him this appeal is taken

I. Wilkinson was surety and Stern the principal debtor. *Klapworth v. Dressler*, 2 Beas. 62; *Stiger v. Mahone*, 9 C. E. Gr. 426; *Crowell v. Hospital of St. Barnabas*, 12 C. E. Gr. 650; *Jones on Mort.* 742; *Calvo v. Davies*, 8 Hun 222, 73 N. Y. 211, and cases cited.

II. Complainants were charged with notice of the assumption.

The record showed it, and this was sufficient, taken together with notice of Stern's purchase. *Calvo v. Davies*, 8 Hun 222.

Stern informed them that he had purchased the mortgaged premises, and notice of the deed was notice of its contents. *Wade on Law of Notice* § 10, and cases cited; *Booth v. Barnum*, 9 Conn. 286; *Hall v. Smith*, 14 Ves. 426; *Clements v. Welles*, L. R. (1 Eq.) 200; *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Van Doren v. Robinson*, 1 C. E. Gr. 256; *Smallwood v. Lewin*, 2 McCart. 60; *Story's Eq. Jur.* 400; 4 Kent's Com. 179; *Daniels v. Davidson*, 16 Ves. 249; *Spinner v. Walsh*, 10 Irish Eq. 380; *Fielder v. Slater*, L. R. (7 Eq.) 523; *White v. Foote*, 102 Mass. 375; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 160 n.; 2 Sugden on Vendors (7th Am. ed.) 559 § 63.

Inquiry became a duty when Stern informed complainants of his purchase. This was sufficient to put a prudent man upon inquiry to ascertain whether there were persons who had acquired rights which were prejudiced by the extension.

Where inquiry is a duty, the party bound to make inquiry is

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affected with all the knowledge which he would have got had he inquired. *Cordova v. Hood*, 17 Wall. 1.

III. The taking of the bond operated to bind Stern in law for the payment of the debt, and necessarily as an extension of the time for one year.

No express agreement was necessary to this end, nor need such an agreement be proved by direct evidence.

The law operating on the act of the parties (the complainant and Stern) created the duty and implied the promise and obligation. *Brandt on Suretyship* 304, and cases cited; *Hill v. Bostick*, 10 Yerg. 410; *Union Bank v. McClurg*, 9 Humph. 98; *Lea v. Dozier*, 10 Humph. 447.

It has been repeatedly held that taking a new note from debtor by the holder of a promissory note payable at a future date, suspends the right of action upon the original demand until the maturity of the last-mentioned note, and the surety upon the same, not assenting thereto, thereby becomes discharged from liability. *Fellows v. Prentiss*, 3 Denio 512; *Bangs v. Mosher*, 2 Barb. 478; *Dorlan v. Christie*, 39 Barb. 610; *Albany City Ins. Co. v. Diefendorf*, 43 Barb. 444; *Place v. McIlvain*, 38 N. Y. 96; *Hubbard v. Gurney*, 64 N. Y. 457; *Brandt on Suretyship* 316; *Kitty v. Jenkins*, 1 Holt 73, 74; *Elwood v. Diefendorf*, 5 Barb. 398; *Appleton v. Parker*, 15 Gray 173; *Chitty on Bills* (8th ed.) 445, 446; *Hubbard v. Carpenter*, Id. 520; *Austin v. Darwin*, 21 Vt. 38; *Chicasau v. Pitcher*, 36 Iowa 593.

"If the debt for which the surety is bound is evidenced by a bond or other sealed instrument, and the creditor takes from the principal for the debt a note, bill or other negotiable instrument which falls due after the original obligation matures, this usually amounts to an extension of time and discharges the surety." *Armestead v. Ward*, 2 Patt. & H. 504; *Clark v. Hentz*, 1 You. & Coll. (Exch.) 187; *Hooker v. Gamble*, 9 U. C. C. 1 434, 12 Id. 512; *Smith v. Crease*, 2 Cranch C. C. 481; *Bangs v. Mosher*, 23 Barb. 478.

The consideration was sufficient. *Brandt on Suretyship* 307; *Shallings v. Johnson*, 27 Ga. 564; *Chute v. Pattee*, 37 Me. 10.

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It mattered not that the debt was then due. *Brandt on Suretyship* 312; *Turril v. Boynton*, 23 *Vt.* 142; *Stowell v. Goodnow*, 31 *Me.* 538; *Cartin v. Savory*, 14 *Gray* 528; *Veazie v. Carr*, 3 *Allen* 14.

The time for payment of the debt being extended, the right to foreclose is, of course, suspended until the expiration of the extended term.

"A verbal agreement to extend is binding, and suspends the right to foreclose, if made on good consideration." *Jones on Mort.* 1190, and cases cited. See 1 *Hilliard on Mort.* 233.

"A mortgage is merely security for or incident to a debt, and follows the nature of the debt itself." "In common sense, he has 'only a pledge.'" *Hilliard on Mort.* 234, and cases cited.

"The assignment of the debt or forgiving it will draw the land after it as a consequence—nay, it would do it though the debt were forgiven only by parol." *Hilliard on Mort.* 236; *Frich, L. K., in Thornbough v. Baker*, 1 *Cases in Ch.* 285; 2 *Story's Eq. Jur.* 1023 n.

"The debt is the principal thing." *Matthews v. Walwyn*, 4 *Ves.* 128; *Dudley v. Cadwell*, 19 *Conn.* 218.

"Until foreclosure, or, at least, until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and in propriety, it cannot and ought not to be detached from its principal." *Kent, C. J., in Jackson v. Willard*, 4 *Johns.* 43. "*Accessorium non ducit, sed sequitur suum principale.*"

Extending the mortgage extends the note. *Flanders v. Barton*, 6 *Shepl.* 357.

"The mortgage is a mere pledge or security for the debt." *Story's Eq. Jur.* 1015.

IV. Wilkinson was discharged from liability by the extension. *Brandt on Suretyship* 381, and cases cited; *Solomon ads. Gregory*, 4 *Harr.* 112; *Calvo v. Davies*, 8 *Hun* 222, 73 *N. Y.* 211; *De Colyer on Guaranties and P. and S.* 407, 408, and cases cited; *Thompson v. Bowne*, 10 *Vr.* 2; *Lime Rock Bank v. Mallen*, 34 *Me.* 547; *Bell ads. Martin*, 3 *Harr.* 167; *Gifford v. Allen*, 3

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Metc. (Ky.) 255 ; *Wright v. Bartlett*, 43 N. H. 548 ; *People's Bank v. Pearson*, 30 Vt. 711 ; *Paulin v. Kaighn*, 3 Dutch. 503 ; *Huffman v. Hurlburt*, 13 Wend. 375 ; *Oakley v. Pasheller*, 4 C. & F. 20 ; *Stewart v. Parker*, 55 Ga. 656 ; *White v. Whitney*, 51 Ind. 12 ; *Myers v. First Nat. Bank*, 78 Ill. 257 ; *Lamman v. Nichols*, 15 Iowa 161 ; *Reynolds v. Weed*, 5 Wend. 501 ; *Newman v. Finch*, 25 Barb. 173 ; *Hart v. Hudson*, 6 Duer 294 ; *Grant v. Smith*, 46 N. Y. 97 ; *Bangs v. Strong*, 10 Paige 11 ; *Fox v. Parker*, 44 Barb. 541 ; *Story's Eq. Jur.* §§ 325, 326 ; *Rees v. Barrington*, 2 Ves. Jr. 540 ; *Bellington v. Wagoner*, 33 N. Y. 32 ; *Bowd v. McDonough*, 39 How. Pr. 389.

There are, however, cases which hold that giving time to the principal debtor does not operate to discharge the surety ; but we submit that none of them are applicable to the case in point, but may readily be distinguished from it.

They are based upon the fact that, for special reasons, the surety cannot possibly be affected, and is not discharged from his engagement. For example :

1. Where the agreement giving time to the principal debtor is expressly made, with a reserve of remedies against the surety. *Webb v. Hewitt*, 3 K. & J. 438.

It has been held that to keep alive the liability of the surety, it must, as a rule, appear on the face of the instrument giving time that the rights of the surety are reserved. *Ex parte Glendenning*, Buck. 517, 520. See, also, *Boulbee v. Stubbs*, 18 Ves. 20.

Though it has been also held that such a reservation may be proved by parol evidence. *Ex parte Harvey*, 33 L. J. (Bankr.) 26, 32. And see 4 B. & C. 515, 516, note (a.)

2. Where the effect of the agreement between the creditor and the principal debtor is to accelerate the surety's remedies as obviously as against the surety, this does not amount to an agreement giving time.

3. Besides the general rule governing all questions of this kind is, that a surety is not discharged : (a) if his remedies are not interfered with ; (b) if the agreement is made with his assent ; (c) or if he subsequently confirms it. *Oriental Financial Corporation v. Overend*, L. R. (7 Ch. App.) 142 ; *Samuel v. How*

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h, 3 *Meriv.* 272 ; *Oakley v. Pasheller*, 10 *Bli.* 548 ; *Owen v. man*, 4 *H. L. Cas.* 997 ; *Haynes v. Lilley*, cases in *S. C. of wofoundland* 115 ; *Wyke v. Rodgers*, 1 *De G., M. & G.* 408 ; *ith's Man. of Eq.* 84, 85 ; *Calvo v. Davies*, *ubi supra*.

The opinion of the court was delivered by

BEASLEY, C. J.

The only question in litigation in this case is with respect to a legal position of Wilkinson, the respondent in the controversy. He has filed an answer setting up that by reason of certain circumstances, which are stated, he has been discharged from the obligation of the bond which he executed to the appellant, and by force of which a decree for deficiency is now sought against him. Those circumstances are as follows : That when he sold and conveyed the mortgaged premises, his grantee assumed the payment of the mortgage in question, and that, by such assumption, such grantee became the primary debtor, and that he, the respondent, stood in equity as his surety, and that the appellant, having knowledge of the situation, made a subsequent arrangement with Stern, whereby the time for the payment of the mortgage debt was extended, and that such extension, upon well-known legal and equitable principles, set him free from the bond of his suretyship. If such an adjustment was consciously made by the appellant, there can be no doubt that it affords this respondent a defence to the claim now preferred against him. The surety has a vested interest in the contract between the primary debtor and the creditor, to the performance of which he has bound himself, and that contract cannot be altered without his consent, so as to affect his equitable or legal position ; and if such modification be effected, the consequence is the exoneration of the surety from all liability. This principle is elementary and indisputable.

To this position the answer of the appellant is twofold ; first, that it, the appellant, when it made the arrangement with Stern, taking his bond for the payment of the mortgage debt, was not

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aware of the stipulations of the respondent's grantees and their privies, whereby they had assumed the payment of the money in question, and that thereby the respondent had been converted into a surety; and, second, that the arrangement so made with Stern, and the acceptance of his bond, had not the effect attributed to such acts, and did not alter the contract as originally made between the appellant and its mortgagor.

The first point in this response does not seem to me material. The fact that respondent's grantee assumed the payment of the mortgage, and the question whether the appellant knew of such fact when it dealt with Stern, are matters that have no legal efficacy whatever in this inquiry, the reason being that, entirely independent of such considerations, it conclusively appears from the circumstances of the case, that the appellant was aware that the respondent stood in the attitude of a surety in this transaction. In point of fact, the respondent never had any connection with this affair except in that character. He never was primarily liable; he always was, from the outset, secondarily liable. Grant that his, the respondent's, grantee did not assume the payment of the mortgage debt, still, the respondent stood only as surety for such debt. This was the original position of the respondent: Crosby was the owner of the property, and gave the mortgage in question to the appellant; he then conveyed to Crockett, who assumed payment of the mortgage, and executed a second mortgage, under which the premises were sold, the respondent becoming the purchaser. By such act of purchase the respondent assumed no personal responsibility with respect to the mortgage debt; he then executed the bond to the appellant, on which a decree against him for deficiency is now demanded. The question then arises, Did this instrument impose on him the obligation of a principal debtor, or that of a surety? That a *status* of the latter kind was created is clear from the statements of the bill of complaint. In that pleading this obligation is described as the respondent's "collateral bond to secure the same indebtedness secured by the mortgage" given by Crosby. This bond of the respondent, then, was not to constitute the primary obligation, but was to stand as collateral to

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such primary obligation. Such a secondary responsibility placed the respondent in the position of a surety to the mortgagor, and if he had been obliged, by a suit on this bond, to pay the deficiency that should have arisen on a sale of the mortgaged property, he would have had the right to be subrogated to the claim of the appellant against the mortgagor. Possessed of such a *status*, there has been no period of time since the creation of this bond when the appellant could have extended the time for the payment of the mortgage debt without, by such act, releasing the respondent from his liability with respect to such moneys. As, therefore, by the original connection of the respondent with this business he was constituted a surety, and there is no pretence that such position was subsequently changed, there is no necessity to look into the effect of the conveyance and the assumptions contained in it, in order to ascertain his legal or equitable relationship to the appellant, emanating from that source. That part of the argument relating to the effect of such conveyance and assumption will be discarded from the discussion as superfluous and nugatory.

The simple question, therefore, that the court is at present called upon to settle is the one that touches the effect of the Stern bond.

That instrument bears date on the 1st of March, 1875, and was given by Stern to the appellant in the penal sum of \$2,000, the condition being for the payment of \$1,000 and interest, in one year from date. In its condition it is expressly declared that it is given for the "same money mentioned in a bond dated September 2d, 1870, made by Ebenezer M. Crosby to the fire insurance company," and it is further stated that "this bond executed by Stern is collateral" to the Crosby bond just mentioned. The acceptance of this bond is the only circumstance in the case which affects this point of inquiry. The vice-chancellor, in deciding the case in the court of chancery, came to the conclusion that the taking of this bond by the appellant, *ipso facto*, incapacitated it from at once proceeding to foreclose its mortgage, and on that account, as it altered the contract between the creditor and the principal debtor, it operated as a discharge of the

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respondent, who was a surety of that debt. It will be observed that this result proceeds from the adoption of the proposition that the mere giving of collateral security, payable in the future, for a debt already matured, by operation of law, and in the absence of any accessory agreement, has the effect of suspending the right to enforce the payment of such matured debt. That doctrine I do not think it possible to maintain, for it stands opposed not only by the great weight, but by all of the authorities. This case, when in the court below, was likened to that of *Calvo v. Davies*, 73 N. Y. 211, but I can see no similarity between the two, for in the New York case there was an express agreement to extend the time of the payment of the original debt, while in the present case, whether such agreement to postpone such time of payment exists, is the very subject of inquiry. I have said that I have found all the decisions opposed to the theory on which the decision in the court of chancery was rested, and I also think that theory contrary to a fair interpretation of the act done by these parties. The transaction between them was this: The one party gave, and the other party received, a bond conditioned for the payment of these moneys in one year after date, with the understanding that such bond should be collateral to the original bond and mortgage. Now, in terms, it is declared that this obligation is not to be substitutionary, that is, it is not to take the place of the primary obligation, but is to be collateral to it. From what circumstance, then, is it to be deduced that such primary obligation is not to be enforced until the collateral obligation falls due? It is, indeed, argued that we cannot suppose that the respondent, unless this effect were to ensue, would have taken upon himself this personal covenant; that he received nothing by it, if the appellant could at once proceed to foreclose the mortgage. But such a line of observation overlooks the fact that although the obligor in the collateral bond would obtain, from the nature of the transaction, no binding obligation against the immediate enforcement of the mortgage, he nevertheless put things in such a position as to render it extremely unlikely that such a step would be taken, and it is upon such probabilities that human conduct is very commonly founded.

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It was the usual course for this insurance company to take these collateral bonds from the purchasers of property on which it held a mortgage lien, and, under ordinary circumstances, it was a natural inference, the required security being given, that the encumbrance would be unenforced indefinitely; in such a situation, it was therefore not surprising that the respondent would give the bond in question without exacting in return an agreement, on the part of the company, to postpone the right to enforce the mortgage, an agreement which such company would not have been likely to enter into, as its obvious effect would have been to discharge the respondent from his responsibility, and otherwise to confuse and impair the securities already in its hands. These observations are sufficient, I think, to repel the notion that the act of the respondent in giving the bond in question was an absurd act, unless it was accompanied with a stipulation that the prosecution of the mortgage should be stayed.

But even on the assumption that the act of the respondent in this respect was unwise or even foolish, such act must stand, and must be carried by the court to its legal results. The sole question is, How have the parties agreed; and all we know upon that subject is, that it was the understanding that a collateral bond would be given. That is the entire agreement. If they saw fit they might have agreed that all proceedings in the original bond and mortgage should be suspended during the running of the new bond. But they did not make any special stipulation to this effect, and I have already said that such a stipulation is not to be inferred from the giving of such an instrument. The decisions forbidding such an inference are numerous, and many of them are collected in the briefs of the counsel of the appellant. From these citations I will refer to one or two cases, with a view to show how strongly the doctrine in question is enforced, and how completely it is considered to be established. My first reference is to the case of *United States v. Hodge*, 6 How. U. S.) 279. It was an action on a postmaster's bond, and the defence of the sureties was, that the postmaster, in consequence of his alleged defalcation, in order to secure the government, had given his own mortgage, payable in six months from date.

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The question was, whether the mere taking of this instrument suspended the remedy on the bond of the postmaster, and the conclusion of the court was that it did not have that effect. Nothing can be clearer than the judicial statement that the simple giving of collateral security will not, *per se*, have the effect to suspend the right to proceed on the primary security. Thus Justice McLean, in the opinion read in the case, says: "Payment under the mortgage could not be enforced until after the lapse of six months from its date. And it appears that the mortgage was designed to cover the whole amount of Ker's (the postmaster) defalcation. But the important question is, whether this mortgage suspended the legal remedy of the department on the official bond of the postmaster. There is no provision of the mortgage to this effect. And it cannot be successfully contended that *taking collateral security merely* can suspend the remedy on the bond. * * * Now, if the post-office department had, by the mortgage, suspended the right of action on the bond for the time limited in the mortgage, it might have released the sureties. But no such condition is expressed and none such can be implied. The mortgage does not purport to be given in lieu of it in discharge of the bond. It is merely a collateral security."

To the same effect, and equally emphatic in its statement of the rule in question, is the decision in the case of *Niemcewicz v. Ghan*, 3 Paige 613, 11 Wend. 312. The facts were these: Mrs. Ghan, to secure a loan to her husband, had joined with him in giving a mortgage on her own land to Mrs. Niemcewicz. Interest falling due, the mortgagee took the husband's note for it, and in a foreclosure Mrs. Gahn set up this extension of time as a defence *pro tanto*. The court overruled this defence, on the ground that the taking of the note did not of itself raise an implication that it was the contract that the remedy on the mortgage was to be deferred. When the case was in the court of appeals, Chief-Justice Nelson, in the plainest terms, entirely repudiated the theory that the acceptance of collateral security raises up any such implication. He says: The note "was collateral to the bond; and if so, it cannot influence the remedy upon the latter (the original bond) without an express agreement to that effect

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ich cannot be pretended in this case. The time when the new security becomes due does not vary the effect and operation of upon the old, as abundantly appears from the above cases. of them became due, or could not be enforced until some e after they were taken; but this circumstance implied no eement to postpone the remedy upon the old security. Those s all turned upon the point that no agreement had been made forbear in consideration of the new security at the time it was ived, and that *the mere receipt of it did not imply one.*"

The following authorities, taken from the briefs of counsel, equally in point, so far as concerns the legal principle under sideration: *Pring v. Clarkson*, 1 B. & C. 14; *Twopenny v. ung*, 3 B. & C. 208; *Wyke v. Rogers*, 1 De G., McN. & G. 8; *Cary v. White*, 52 N. Y. 138.

The cases cited in opposition by the counsel of the respondent ve been examined, but none of them are deemed in point, as not ingle case is presented in which it was held that an accessory urity, admitted to be collateral, operated, by the sheer, intrinsic ve of the act of accepting it, to suspend the right of suit the original obligation.

The appellant is entitled to a decree as prayed for.

Decree unanimously reversed.

THE AMERICAN DOCK AND IMPROVEMENT COMPANY, AND
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
complainants and appellants,

v.

THE TRUSTEES FOR THE SUPPORT OF THE PUBLIC SCHOOLS,
THE EXECUTORS OF ASA PACKER, DECEASED, et al., defend-
ants and respondents.

n 1872 the legislature authorized the riparian commissioners, governor and rney-general to make a deed in the name and under the great seal of the , to the New Jersey West Line Railroad Company, for any lands of the

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state under tide water, or that theretofore had been under tide water should happen to come within the location of the route or of the depots or other works of the company or be needed therefor—the bond and price to be fixed by the riparian commissioners—the consideration paid to the trustees of the school fund. A deed was made accordingly 19th of March, 1872. For part of the consideration (\$82,000) the trustees for the support of the public schools accepted a bond with Asa Packer as secured by mortgage on the premises, as an investment for the benefit of the school fund. The Central Railroad Company was in possession, and made improvements on part of the premises granted. On the 12th of November 1874, the riparian commissioners, for \$300,000, made a grant to the Central Railroad Company of several tracts of land under water, excepting the premises and privileges granted to the West Line company, with a proviso that in case the state had not power to vest title in the West Line company, the state should, for the consideration of \$1, release to the Central Railroad Company the premises granted to the West Line company, free of any encumbrance thereon, by mortgage given to the state. The trustees closed their mortgage, and took a final decree October 22d, 1875. The plaintiffs were not parties to the foreclosure suit. On March 1st, 1879, the plaintiffs filed a bill against the West Line company, under the act to quiet title, *Rev. 1189*. The mortgagees and other encumbrancers and Asa Packer made defendants in this bill. The bill prayed, among other things, that the trustees be restrained from selling the mortgaged premises under their mortgage. On appeal from an order of the chancellor denying an injunction to prevent sale under the execution, on the foreclosure decree, pending the suit—

1. That the trustees for the support of public schools are the custodians of the fund set apart for the support of public schools, free by constitutional provision from even the control of the legislature, except in the designation of the mode in which the interest and dividends arising therefrom shall be applied for the support of public schools. For the purposes of the administration of the fund of which they are made custodians and of the right of remedies upon or against the securities in which it is invested, they are constituted the representatives of the state.

2. Suits brought by the trustees for the foreclosure of mortgages—on the investments of the school fund—are subject to the same defences by answer as bills as like suits by other mortgagees; and, as mortgagees, they may be made parties to a bill to quiet the title filed against the mortgagor.

3. The covenant contained in the grant of the riparian commissioners to the Central Railroad Company, is executory in terms and legal effect, and can only be executed by a bill for specific performance. To such a bill the state is a necessary party, and the trustees are not its representatives in such a bill.

4. The riparian commissioners had no power, by the covenant contained in the grant to the Central Railroad Company in 1874, to release and di-

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a mortgage which before that time was an investment of part of the school fund.

5. A mortgagor who mortgages an embarrassed title, or whose title has subsequently become clouded, cannot, in the absence of fraud, have the foreclosure proceedings stayed on account of an apprehension that the mortgaged premises will not bring full value at a foreclosure sale. His remedy is by redemption.

6. A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the reason that such a sale will not prejudice the rights of the latter. To warrant resort to the restraining power of the court, the case must present some recognized ground for equitable relief—fraud or irreparable injury.

7. Courts interfere with great reluctance with the collection of the public revenues. To justify resort to a court of equity to stay the collection of public revenues, the party must make a case strictly within the bounds of equity jurisdiction—an injury otherwise not remediable; and he must seek and prosecute his remedy with promptitude.

8. The equity of a party who relies on an equitable estoppel to give validity to an inefficient contract is not to have his contract made binding, but to put his adversary to an election between performance of the contract and repudiation of it on equitable terms.

9. The doctrine of equitable estoppel presupposes that the person against whom it is set up has the volition to accept or reject the proffered benefit and power to restore the consideration if received.

10. The trustees for the support of public schools have no control over the state's lands under water; no authority to decide what lands under water shall or shall not be sold; or to fix the price or dictate the terms and conditions on which sales shall be made, nor power to rescind contracts of sale made by the riparian commissioners, which they may deem prejudicial to the school fund. They have not even the capacity to determine from what sources the revenues for the support of public schools shall be derived; no choice as to what money shall or shall not become part of the school fund. Their powers and duties in relation to the school fund are purely executive and ministerial—to invest the fund and appropriate its income annually to the support of public schools.

11. The trustees are not equitably estopped from collecting their mortgage by the covenant which the riparian commissioners inserted in their grant to the Central Railroad Company, although the state received for the lands granted thereby the sum of \$300,000, which, by the act to increase the school fund of the state (*Rev. p. 1061 § 67*), went into and became part of the school fund.

12. The prayer of the executors of the surety (who have no indemnity for the liability of the surety's estate on the bond except the vendible value of

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the mortgaged premises and the obligation of a bankrupt corporation), the sale of the mortgaged premises be sold, also presents considerations of pre-eminence and weight on an application to a court of equity for a discretionary writ, which is never allowed except on a clear preponderance of equity on the side of the applicant.

13. The receiver of the West Line company, the mortgagor, by his answer to the bill in this case, affirms the validity of the title of the West Line company, but charges that it would be inequitable to dispose of the title by foreclosure, or otherwise, until its validity as against the complainants' title is determined, and asks, also, that the sale be delayed until it can be made upon an unclouded title. The executors of the surety pray a sale for the purpose of discharging his liability on the bond. A sale of the mortgaged premises at this time will satisfy the mortgage debt.—*Held*, that, under the circumstances, the covenant contained in the grant to the Central Railroad Company would create an equity in the complainants to be allowed to redeem the trustees' mortgage and be subrogated to the right of the mortgagees in the decree so far as to give protection against a sale under it, pending the litigation of the titles of the parties respectively, subject, however, to the equities of the personal representatives of the surety on the bond; but that it could not be made available to the complainants against the indisputable equity of the mortgagees, and of the personal representatives of the surety on the bond, to have the mortgage and the liability of the surety taken out of this litigation and disposed of in the condition of affairs as they were when the mortgage was given and the obligation of the surety was incurred.

On appeal from a decree of the chancellor, whose opinion is reported in *American Dock Co. v. Trustees of Public Schools*, 5 *Stew. Eq.* 428.

Mr. F. T. Frelinghuysen, for appellants.

PART I.

The chancellor declines to enjoin the trustees for the support of public schools, on the ground that they are agents of the state, and, as such, have an immunity from being sued.

It is undoubtedly true, as claimed, that the state, as an essential attribute of its sovereignty, enjoys an immunity from being sued in its own courts, without its consent. *Loder v. Baker*, 10 *Vr.* 50.

I. That position does not sustain the chancellor's order.

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The state is not a party to this suit, and a state never is a party unless it appears on the record as such. It is not sufficient to oust jurisdiction that the state may have an interest in the cause, or that the parties before the court are sued for acts done as agents of the state. *Osborn v. U. S. Bank*, 9 Wheat. 852, 853; *Story on Const.* § 1685.

The point arose in an early state of the government, in a suit between private persons, where one party asserted the land in controversy to be in Connecticut and the other in New York, and the court held that neither state could be considered as a party. *Fowler v. Lindsey*, 3 Dall. 411; *State of New York v. State of Connecticut*, 4 Dall. 1, 3, 6; *United States v. Peters*, 1 Cranch 115, 139; 1 Kent's Com. 302 § 15.

Neither is there anything in the cases cited by the chancellor that conflicts with the foregoing positions. I will refer to each of them.

1. He cites *Michigan State Bank v. Hastings*, 1 Walk. Ch. 9. This case was overruled by the supreme court in the case of *Michigan State Bank v. Hammond*, 1 Doug. 527, and *Same v. Hastings*, Id. 225. In this last case it was held that although a state could not be sued in its own courts, yet that the rule applies only where the state is made a party defendant to the record.

2. *United States v. McLemore*, 4 How. 286.

The court (McLean, J.) says: "There was no jurisdiction of this case in the circuit court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs."

3. *Hill v. United States*, 9 How. 388.

The point decided in this case is, that a bill in equity to enjoin the United States cannot be entertained.

4. *Beers v. Arkansas*, 20 How. 529.

The state of Arkansas, through its legislature, authorized the state to be sued. After a suit had been commenced and was pending against it, an act was passed imposing certain restrictions, viz., requiring the filing of bonds by the plaintiff, or dismissal of the suit.—*Held*, that the authorization of a suit against

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a state was not a contract, and that the suit pending was subject to the act afterwards passed.

5. *State v. Kirby*, 2 South. 835, and *Loder v. Baker*, 10 Vr. 49.

These cases merely decide that the state, as such, cannot be sued without its consent.

6. *Priddy v. Rose*, 3 Meriv. 84.

This suit was against government officers, the treasury of the navy, and the attorney-general, for the recovery of moneys due from the government.

The court (Sir William Grant, M. R.) says: "Here the officer is commanded by the government to withhold the money. * * * Then the question is between the government and Mr. Hurst, or Mr. Hurst's assignee, and it is not, I apprehend, in this court that such a question can be decided." That was not the court, as another was provided. Although no court is provided in New Jersey to establish claims against the state, we may admit that the trustees for the support of public schools could not be sued for money or on account of a duty due from the state. All we claim is, that they may be restrained, even if the state is interested, from using their office to violate private right.

7. *Nurse v. Lord Seymour*, 15 Beav. 254.

This case was upon a demurrer to a bill for specific performance and for compensation &c., filed by the plaintiff against the commissioners of woods and forests.

The commissioners (as was held) were not (under 7 Geo. IV. c. 77) entitled to sue or liable to be sued for the specific performance of contracts entered into with and by them.

The court (Lord Langdale, M. R.) says: "It is truly said that if these commissioners are liable to sue, and to be sued, such liability must rest alone upon grounds and reasons distinctly stated in the statute, for their powers are entirely statutory, and nothing else."

There is no question in this case of the right of the trustees &c., to sue, and should be no question that they are liable to be

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restrained from improperly using the process of the court; and see the case of *Rankin v. Huskisson*, 14 Sim. 13.

8. *Trustees for the Support of Public Schools v. City of Trenton*, 3 Stew. Eq. 669, which, in giving construction to the tax laws, decides that the school fund is the property of the state, and not subject to be taxed, because such taxation would necessarily involve other taxation to pay the taxes.

9. *State v. Trenton*, 11 Vr. 91, is to the same effect as last case.

I have thus noticed every case the chancellor refers to, and find no intimation there or elsewhere that parties suing cannot, because they are agents of the state, be restrained from improperly using the process of the court.

But if the fact that the state has an immunity from suits does not oust the court of jurisdiction, the chancellor intimates that the suit should not be maintained, because the state is not a party.

II. There is no necessity that the state should be made a party to the suit, had that been possible. In 1874, the riparian commissioners asserting, and the Central Railroad Company denying, the validity of the grant to the West Line Railroad Company, the said commissioners, for a full consideration, agreed that if the state had not the right and power to make the grant, that the state, for one dollar, would release the premises described in the grant, free of encumbrance, to the Central Railroad Company of New Jersey. But there is not a word in the bill or in its prayer that seeks a decree that the state shall execute such release. If there were it would have been proper or essential that the state, were that possible, should be made a party, but such is not, in any sense, the object or prayer of the bill.

III. The trustees &c. are a public corporation with a limited power of bringing suits, and subject as to those suits, as other suitors are, to be defended against, either by the persons they bring into court, or by those having a property interest in the subject matter of the suit. The defence may be by answer or

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cross-bill, or by invoking the restraining power of the court that have selected.

Within the compass of its functions for contracting, taking, purchasing, holding, lending, managing and selling and conveying school property, it has all the powers and liabilities of a corporation; all the common law incidents of a corporation inhere in this body, within the range and in its execution of the purposes of its corporation. *Levy Court v. Coroner*, 2 Wall. 501.

As to the liability to be sued being an inseparable common law incident to every corporation, see *Kyd. on Corp.* 69; 2 K 278; 1 Black 475; *Ang. & Ames on Corp.* 110.

County commissioners in Pennsylvania are *quasi* corporations and capable of being sued. *Van Kirk v. Clark*, 6 Serg. R. 286.

The governor of a state is a *quasi* corporation *sole*, and bonds payable to him may be sued in his name. *Governor v. Allen*, *Humph.* 176.

Nor does the fact that the state alone is interested in the corporation clothe it with the immunities of sovereignty, or exempt it from the jurisdiction of the state courts. *State Bk. So. Ca. v. Gibbs*, 3 McCord 377.

The suit of *Young v. Trustees for the Support of Public Schools*, 4 Stew. Eq. 290, being an appeal from the decree below is as much a suit as is this bill to restrain the enforcement of the decree filed by one who could not appeal.

IV. I will now notice some other positions taken by the chancellor.

1. As to the statement of the chancellor, that "the trustees are not empowered to defend their title to the mortgage," that "they have no funds with which to carry on litigation, and no authority to spend the money in their hands for such purposes," we reply, that if they have no authority to defend their title to the mortgage, the result must be that they must not attempt to enforce their title to it, not that their mere assertion of title against the citizen by suit is to have the effect of an irreversible decree.

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2. The chancellor having decided that this suit is well brought to quiet the title of the complainants, then states that it would be superfluous for him to consider the question of title, because the state or its agents are not liable to be sued.

Now, if the chancellor holds that he has not jurisdiction of the case, his judicial control over it there terminates, and the decision of the jurisdictional question should not be prejudiced by any extra-judicial expressions as to the merits of the complainants' application.

3. The chancellor still further, after deciding that he has no jurisdiction over the case, expresses the opinion that a sale will not injure the complainants, because the purchaser will have no more title than the mortgagor, the West Line Railroad Company, had.

Is it no injury to the complainants, in their credit, peace and prospective arrangements, to have the property on which they have spent hundreds of thousands, and in relation to which they have spent millions, sold at public sale, and that, too, by the state, and under a title which it is claimed is the state's title?

Is it no damage to the holders of the \$3,000,000 of bonds given by the dock company, and secured by a mortgage on these and adjoining lands, that the mortgaged premises are thus sold?

It seems, therefore, to follow as a necessary consequence, that if the aid of equity may be invoked to remove a cloud upon title to realty, it may, with equal propriety, be exerted to enjoin such illegal acts as will necessarily result in a clouded title. *High on Inj.* § 269; *Pettit v. Shepherd*, 5 Paige 493; *Christie v. Hale*, 46 Ill. 117; *Oakley v. Trustees &c.*, 6 Paige 262.

And it may be asserted as a general proposition, that a sale of lands under execution, which would confer no title upon the purchaser, and whose only effect would be to cloud the title of others, will be enjoined. *Bank of U. S. v. Schultz*, 2 Ohio 471; *Norton v. Beaver*, 5 Ohio 178; *Christie v. Hale*, 46 Ill. 117; *Pixley v. Huggins*, 15 Cal. 127.

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In *Key v. Munsell*, 19 Iowa 305, it is held that it is necessary that the sale should divest the complainant of title to warrant equity interfering; it is sufficient that it simply operates to cloud his title. *Herman on Ex.* 610; *Freen on Ex.* § 438. See, also, *Holmes v. Chester*, 11 C. E. Gr. 79

4. But further, the injury done by a sale in this case would be marked and peculiar. The receiver of the Central Railroad Company asks that the sale be restrained, and the receiver of the West Line company, while insisting on the validity of the grant, claims that, to sell the property before the title is settled will injure his company, as the property, under such circumstances, will not realize more than the amount of the mortgage.

5. The chancellor again, after deciding that he has no jurisdiction, adjudges that the state claims that the state had good title to make the grant, and that the complainants have no title and that the weight of authority is, that in the absence of fraud and irreparable injury, courts of equity will not restrain judicial sales.

Mills on Em. Dom. § 46, says: "To take property already appropriated to another public use, the act of the legislature must show the intent to do so, by clear and express terms, or necessary implication, leaving no doubt or uncertainty respecting the intent."

A general authority to lay out a railroad does not authorize a location over land already devoted to another railroad or public use (the act must be distinct on that point), unless the route specified necessarily crossed another railroad, turnpike or canal, where the right to cross would arise by necessary implication. *State v. E. & A. R. R. Co.*, 7 Vr. 181; *N. J. S. R. Co. v. Long Branch Comrs.*, 10 Vr. 28; *M. & E. R. R. Co. v. C. R. R. Co.*, 2 Vr. 205; *Housatonic R. R. Co. v. Lee & E. R. R. Co.*, 118 Mass. 391.

6. The chancellor further refers to *High on Inj.* § 273 to show that a sale will not be enjoined "when, under the peculiar judicial system of the state, ample remedy may be had at law. The peculiar system of New Jersey is, that the remedy is in equity, and under an act passed March 2d, 1870, entitled "

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act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same." *Rev. p. 1189.*

The chancellor decides that he has ascertained from an examination of this case, that the state is interested in the suit. Chief-Justice Marshall, in *Osborn v. U. S. Bank*, 9 *Wheat.* 853, says: "It would be a curious anomaly for the court to examine and decide on a state's interest without having a right to exercise any jurisdiction in the cause." But waiving that, how did the chancellor ascertain that the state was interested in the case?

It would be well nigh a farce for this highest court of New Jersey to decide that this immunity from suit by citizens of New Jersey extended to a respectable, but by no means sovereign, citizen of Pennsylvania.

PART II.

I. Assuming, for the present, that the grant made by the riparian commissioners was authorized by the act of the legislature, the appellants (who were the complainants below) insist that the mortgage in question, given by the New Jersey West Line Railroad Company, is invalid, because on premises which are the property of the complainants by reclamation; and under this head we will show—

1. The premises in question consist of a tract in Communipaw Cove, within the riparian commissioners' exterior line of filling, containing fifty-eight and thirty-six hundredths acres.

2. We submit that the Central Railroad Company had the corporate power to become the owner of the *ripa* on which the premises rest.

"Corporations have incidentally, at common law, the right to take, hold and transmit real or personal property to an unlimited extent." *Ang. & Ames on Corp.* § 145, and cases there cited; *McCartee v. Orphan Asylum*, 9 *Cow.* 437, 508; *Leazure v. Hillegas*, 7 *Serg. & R.* 319; *Runyon v. Foster*, 16 *Pet. (U. S.)* 128; *Rainey v. Laing*, 58 *Barb.* 453, 489.

This distinction between restricted capacity to purchase and restricted capacity to hold, has been carried so far that the court has enforced specific performance of a contract to convey land to

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a corporation which had no capacity to hold it. *Banks Poitiany, 3 Rand. 136.*

3. We submit that being thus empowered, the Central Railroad Company did become the owner of the *ripa* on the cove.

4. The American Dock and Improvement Company had right to acquire, and did acquire, the premises in question from the Central Railroad Company.

5. We will now consider the extent and character of reclamation.

6. Now what, under the unquestioned law of the state, the property and property rights which this reclamation confer on the complainants? All the New Jersey authorities agree (*Gough v. Bell, 2 Zab. 462; S. C., 3 Zab. 624*) that when, the language of *Stevens v. Railroad, 5 Vr. 548*, the riparian owner has taken possession of the land under water in front of him, the license which was before revocable becomes irrevocable—that is, becomes a vested right. *Keyport Case, 3 C. Gr. 516.*

II. While the law incident to riparian owners generally is that a riparian owner has a revocable license to reclaim in front of his *ripa*, and to have access to such reclamation when made, such revocable license becoming irrevocable on the reclamation being made, we submit that when the Central Railroad Company became the owner of the *ripa* around the cove, it had, by virtue of the provisions of its charter, a vested and irrevocable license to make reclamation and to have access thereto, and if so, such vested right was property, and, of course, passed by the conveyance of 1866 to the American Dock Company, and is property which neither the grant nor mortgage can lawfully invade or becloud.

III. The American Dock and Improvement Company is not only invested with the title of the Central Railroad Company, the *locus in quo*, but, in addition thereto, has title by virtue of an independent grant made to it by the state, for which the state has received or reserved a full consideration.

IV. The state, by its acquiescence in the possession of the *locus in quo* by the complainants claiming title, and by its acquiescence in the large and continuous expenditure made thereon and in relation thereto by the complainants while devoting the premises to a public work, is estopped from denying the complainants' right of possession.

We submit that this acquiescence gives the construction to the charters of the Central Railroad Company and to the charter of the dock company, which those companies claim.

Contemporaneous exposition is of two sorts. First, what was done by the people at the time the law was made. Second, what was done by the authorities of the state under the law. *Smith on Stat. Const.* 438.

The acquiescence of New Jersey in the expenditures of the central and dock companies is more than an exposition of their charters. *Stevens v. Railroad Company*, 5 Vr. 532, declares that by a local custom the shore-owner has a license to reclaim the land between high and low water marks, but that the legislature may revoke this license. The acquiescence renders the license irrevocable. I cite but one of many authorities—*Trenton Water Power Company v. Chambers*, 1 Stock. 471—which holds that where one has permitted another to change the character of the property, and expend large sums of money upon it, he cannot recover the possession by even paying for the improvements; the only relief the court will afford is compensation for his land.

V. The dock company, as the owner of the *ripa* on which the alleged grant to the West Line Railroad Company rests, had, on March 19th, 1872, when the riparian commissioners made the grant, the right of pre-emption—which the commissioners' grant violates, and is, therefore, invalid and void, as is the mortgage given thereon.

The riparian act of 1869 and the act of 1872, are *in pari materia*, and are to be read together.

The rule is, that when one statute was undoubtedly under the consideration of the legislature when passing another, the former

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ought to be taken into consideration in construing the latter statute. *Bacon's Abr. Statutes*, vol. IV., p. 646; *Thayer v. Dudley*, 3 Mass. 296; *Holbrook v. Holbrook*, 1 Pick. 248, 254.

On the subject of *pari materia*, see *Smith on Stat. Const.* § 636; *Sedgwick* (2d ed.) 209 *et seq.* and notes.

In *The Sloop Elizabeth*, 1 Paine C. C. 11, the court lays down the position that, however broad some of the expressions of a statute may be, yet if, on the examination of different statutes in *pari materia*, it shall clearly appear that those broad expressions were intended to be limited by other provisions of other acts upon the same subject, it is not improper to restrain them accordingly.

While it is true that pre-emption, as a privilege, is not abrogated by the act of 1872, we submit that pre-emption is more than a privilege, and is a vested right which cannot be taken away except for public use and upon compensation.

The opinion of the court in *Stevens v. Paterson and Newark R. Co.*, held that the wharf act of 1851 only conferred a license to reclaim between high and low water, which the state, by repealing the act, could revoke at any time before the license had been executed; but this pre-emption is a very different thing.

In *Yosemite Valley Case*, 15 Wall. 77, and *Lytle v. Arkansas*, 9 How. 333, it is held that the mere occupation or improvement of land will not give the settler a vested right against the United States; but when all the preliminaries in pre-emption acts of the United States prescribed for the acquisition of title have been complied with, the pre-emptor has a vested title to the premises of which he cannot be deprived.

Our supreme court, in *State v. Carragan*, 8 Vr. 264, 268, says: "When lands on tide water are within the operation of that act (the riparian act of 1869, which repeals, as to New York bay &c., the wharf act of 1851, and gives the pre-emption right), the shore-owner has no right to reclaim, but has the advantage that may accrue from adjacency to the water until such time as the state shall execute its power of disposition, and also the right of pre-emption at a price to be established under the provisions of

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the law. These are circumstances that may properly enter into the estimate of valuation."

In *Barnett v. Johnson*, 2 McCart. 489, Justice Vredenburg, in giving the opinion of the court of errors and appeals as to the right Barnett had to adjacency to a canal, says: "A right so essential, so universal in its exercise in all time and among all nations, exists, not as was said in *Gough v. Bell*, by a common law local to New Jersey, but by a law common to the whole civilized world."

In *Keyport Steamboat Company v. Farmers Transportation Company*, 3 C. E. Gr. 516, Chief-Justice Beasley says: "Public sentiment from the earliest times to this day, and the whole course of legislative action in this state, have recognized a natural equity in the riparian owner to preserve and improve the connection of his property with the navigable waters."

Grants that are beneficial may be presumed to be accepted, and no express acceptance is necessary. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 470, 506; 12 Wheat. 70.

VI. We submit that there is nothing in the act of 1872 that authorizes the West Line Railroad Company to locate on the lands in question, and that it never did there locate; and, of course, the riparian commissioners were not authorized by the act to execute the grant to that company.

The law is, that where authority is claimed to lay a railroad over lands devoted to a public work, it must be so expressly specified in the act. *Mills on Em. Dom.* § 46.

VII. It is so strenuously insisted that because Francis S. Lathrop joined with John Kean in a bond, that the premises contained in the mortgage should, when sold, bring the amount of the mortgage, and that therefore Mr. Lathrop, the receiver of the Central Railroad Company, is estopped from denying the validity of the mortgage, that a word must be said.

Mr. Lathrop, when he became receiver, found the Central Railroad Company interested in the tract called the West Line grant, in two ways.

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The railroad company had a suit pending claiming title to that tract, and he could not, with propriety, suffer it to be sold without an assertion of the company's title, and he filed his petition to have a grossly informal sale set aside.

Mr. Lathrop, as receiver, held \$900,000 of the bonds of the West Line Railroad Company, and it was his duty to have it determined to whom the premises contained in this grant belonged, before the premises were sold, so that they would sell at a price to realize considerable on the bonds belonging to the railroad company. If, on determination of this suit, it is held that the *locus in quo* belongs to the complainants, he will, by the suit, have saved a very valuable property for the company. If, on the determination of this suit, it is held that the "*locus in quo*" belongs to the West Line Railroad Company, the property will bring such price as will enable him to realize on the \$900,000 of bonds. In either event it was his duty to institute this suit. And that the school fund should suffer no loss of what was due it, he gives bond that when the sale takes place the fund shall realize its debt and cost.

To say that the bond estops the receiver from saying that the mortgage is invalid, is to say that the bond estops the receiver from doing just that which the bond was given to facilitate his doing, and estops him from doing what is unquestionably his duty to do.

PART III.

The complainants insist that had no reclamation been made; had the charter of the Central Railroad Company not required it to treat the claims of the riparian owners as property; had the dock company had no grant for the "*locus in quo*;" had there been no acquiescence on the part of the state for years, while they, claiming title, were making large expenditures; had it been true that the state made a grant of the public works of one corporation to another without providing that the former receive compensation—the complainants insist that were all this so, that still by the common law, by that law as adopted in this

state, by the wharf act of 1851, and by the pre-emption proviso to the eighth section of the riparian act of March 31st, 1869, they have title to the *locus in quo*, have the property right of adjacency and access to the navigable waters of the Hudson, and have the property right of pre-emption, and that the grant invades those property rights, and that therefore it, and the mortgage upon it, are invalid and void.

1. The following is a brief statement of the adjudications in this state affecting the title to lands under the navigable waters of New Jersey : There was a controversy in New Jersey whether the title to the soil under navigable waters was in the East and West Jersey proprietors or in the state. The proprietors, in brief, claimed that the common law assigned the ownership of the sea and arms thereof and the navigable rivers to the king, not only to have jurisdiction thereof, but to have the property therein, and that subjects obtained rights in the soil of the sea by grant from the king ; that Charles the Second, in 1664, conveyed the seas, arms of the sea, and navigable rivers in the territory of New Jersey to his subject, the Duke of York, and that the proprietors hold by several conveyances under that grant.

The state contended that the territory, now New Jersey, and its navigable waters, was held by the king as the representative of the nation, and that Charles the Second transferred the said navigable waters to the Duke of York, governor of the province of New Jersey, as exercising the royal authority, and not for his own use, and that he conveyed the navigable waters to the proprietors, and that they surrendered all governmental rights to the crown ; and that when the revolution took place the people acquired the absolute title to the navigable waters and the soil under them. *Arnold v. Mundy*, 1 Hal. 1.

Waddell v. Martin, in the circuit court of the United States for the district of New Jersey, before Judges Baldwin and Russell, decided October, 1837. This decision was reversed in 1842, by the supreme court of the United States, in *Martin v. Waddell*, 16 Pet. 345 ; *Den ex dem. Russell v. Associates of the Jersey Company*, 15 How. 432 ; *Bell v. Gough*, 1 Zab. 156,

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2 Zab. 462, 3 Zab. 624; *Stevens v. Paterson and Newark R. R. Co.*, 5 Vr. 532.

The court will not consider us disrespectful in presenting some reasons why we should not adopt the opinion of a majority of the court in *Stevens v. Railroad*, to the effect that the riparian owner has no property rights incident to the ripa, either to wharf out, to reclaim, to maintain the benefits of adjacency, but has at best only a revocable license or inchoate right to certain privileges. We have a right to ask the court to consider the questions discussed in that case—because the opinion there expressed is a *dictum* and not an adjudication.

It was an action on the case, brought in the Essex county circuit court. The circuit court rendered judgment for the plaintiff, “for the reason that the act of the legislature set out in the plea does not authorize the acts of the defendants complained of.” A writ of error was then brought to remove the judgment to the court of errors and appeals. Of course the question or issue to be determined in the appellate court was the same as that in the court below, viz., whether the defendants’ charter authorized them to do the acts complained of. Having easily come to the conclusion that the defendants had not received a grant of authority, of what service was it to inquire if they might have obtained it? If they had not obtained it, though they might, judgment must go against them. If they had not obtained it, and could not, judgment must go against them, all the same. The opinion is one which of course can be reviewed.

The opinion is a *dictum*, that is, “an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication.” *Bouvier*. A judicial opinion is one that is on the question before the court.

We have the further right to ask the court to consider the question discussed in *Stevens v. Paterson and Newark R. R. Co.* Because, in and about the year 1863, when the Central Railroad Company, as required to do by the act of 1860, extinguished, by purchase, the claims of the riparian owners around the cove,

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Those claims were not considered, either by the legislative or judicial departments of the government, as mere revocable licenses, for, being such, they would not have been property which the legislature could have lawfully required the railroad company to respect and purchase. We have the right to consider the question discussed in *Stevens v. Paterson and Newark R. R. Co.*, because the complainants, who are trustees for citizens, of what they consider a most valuable property belonging to them, would be derelict if they consented that the state should impair what they seek to show are vested property rights, and thus the state should turn the proceeds of that property into its treasury by merely terming those rights "revocable licenses." For these reasons, the complainants consider it to be not only respectful, but a duty, to insist in the courts of the state that they, as riparian owners, have, incident to their *ripa*, vested property rights, and not a mere revocable license.

2. In England, the riparian owner is considered to have, at common law, property rights incident to the *ripa*. In England, the right of adjacency to navigable water is recognized as property. *Bell v. Hull and Selby R. R. Co.*, 6 M. & W. 699; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. (3 Exch.) 306, L. R. (5 Exch.) 221.

This decision of the court of exchequer chamber was reviewed by the House of Lords in 1872 and reversed. *Lyon v. Fishmongers Company*, L. R., (1 App. Cas.) 662; on appeal from the Lords Justices, L. R., (10 Ch. App.) 674; *Cordwainers Company v. Kearns*, 6 C. B. 388.

3. Let me now call attention to two authors our courts are in the habit of respecting—Angell and Cooley. *Ang. on Tide Waters* (2d ed.) 171, 196, 197.

Judge Cooley says: "So far as these cases [*Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; *Stevens v. Paterson and Newark R. R. Co.*, 5 Vr. 532; *Tomlin v. Dubuque & Co. R. R. Co.*, 32 Iowa 106; S. C., 7 Am. Law Reg. 176] hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to me to justify an appropriation of his property without compensation, for even those courts which hold the fee in the

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soil under navigable waters to be in the state, admit valuable riparian rights in the adjacent proprietor. See *Yates v. Milwaukee*, 10 Wall. 497; *Chicago &c. R. R. Co. v. Stein*, 75 Ill. 41; compare *Pa. R. R. Co. v. New York &c. R. R. Co.*, 11 C. ~~E.~~ Gr. 137." Cooley's Const. Lim. (4th ed.) 680, note; *Id.* (~~3d~~ ed.) 544, note 1.

4. Let me refer to some well-considered cases in the states. *Delaplaine v. Chicago and Northwestern R. R. Co.*, 42 Wis. 214; *Lockwood v. New York &c. R. R. Co.*, 37 Conn. 387; *Pittsburgh v. Scott*, 1 Pa. St. 314, 315; *East Haven v. Hemmingway*, 7 Conn. 186; *McManus v. Carmichael*, 3 Iowa 1; *Storer v. Freeman*, 6 Mass. 435; *Barker v. Bates*, 13 Pick. (Mass.) 255; *Austin v. Carter*, 1 Mass. 231; *Commonwealth v. Charlestown*, 1 Pick. (Mass.) 180; *Simons v. French*, 25 Conn. 346; *Deerfield v. Long Wharf*, 25 Me. 51; *Whittaker v. Burhaus*, 62 Barb. 237; *Mather v. Chapman*, 40 Conn. 382; *Goodsell v. Laws*, 42 Md. 348; *Diedrich v. Northwestern &c. R. R. Co.*, 42 Wis. 248.

5. Let me call attention to a few cases in the supreme court of the United States. *Dutton v. Strong*, 1 Blatch. 23; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Commissioners*, 18 Wall. 51; *Martin v. Waddell*, 16 Pet. 414; *New Orleans v. United States*, 10 Pet. 720; *Bowman v. Wathen*, 2 McLean 376.

6. Let me now call attention to the adjudications of New Jersey.

From the revolution to November, 1870, when *Stevens Railroad* was before the court, by the common law as adopted in New Jersey, modified to suit the circumstances of the people and as manifested by expressions of judicial opinion, by public statutes, and by an unbroken custom, the owner of the shore has been recognized as having a right (and not a mere license to be revoked at pleasure) to adjacency to the water. The best treatise on this subject is the opinion of Chief-Justice Green, in *Gough v. Bell*, 2 Zab. 453-470.

The legislature has for one hundred and forty years recognized the rights of shore-owners below high water mark. And here

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refer to the facts and authorities collated by Chancellor Zabris-
kie, in *Stevens v. Railroad*. *P. L.* p. 139, l. 25, to p. 144, l.
33. See, too, the report of riparian commissioners of 1865
(p. 63, 65), where they say they are not prepared to take
the lead in advising that the shore-owner has not the
vested right, the preference in sale; which is the right of
adjacency. See, too, riparian commissioners' report of 1872,
p. 70. Fisheries are devised by will, conveyed by deeds, and
recorded by actions of ejectment, and yet no grant from the
state.

In the report of Aaron Ogden, Alexander McWhorter, Wil-
liam S. Pennington, James Parker, and Lewis Condict, commis-
sioners on the controversy with the state of New York. And in
the report made to settle the same controversy in 1828, by Com-
missioners Richard Stockton, John Rutherford, Theodore Fre-
linghuysen, Lucius Q. C. Elmer and James Parker.

A general custom existing from time out of mind has the same
force as a general grant, a law or act of parliament. *Matter of*
Drainage along Pequest River, 12 Vr. 179; 6 Peters 714; *Ar-*
nold v. Mundy, 1 Halst. 1; *Gough v. Bell*, 2 Zab. 441, 462;
Bell v. Gough, 3 Zab. 625; *State v. Jersey City*, 1 Dutch. 625;
Keyport Steamboat Co. v. Farmers Transportation Co., 3 C. E.
Gr. 516; *Barnett v. Johnson*, 2 McCart. 489; *State v. Brown*,
3 Dutch. 13.

Let me call attention to two public statutes. One is entitled
"An act to authorize the owners of land upon tide water to
build wharves in front of the same," passed March 18th, 1851,
(*P. L. of 1851*), p. 71. The other act is the supplement to the
riparian commissioners' act, passed March 31st, 1869. (*P. L.*
of 1869, p. 44.)

7. Let me now call attention to the majority opinion of the
court in *Stevens v. Railroad*.

The question is properly stated to be whether the owner of
land on tide water has such a right to the use of the water, that
the state cannot destroy or abridge that right without compen-
sation. In other words, has the shore-owner any rights in the

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use of the water? for a right can be taken from no citizen without compensation, unless he forfeits it.

As to the case of *Royal Fishery of the Baune, Davies 1* ("Mich. S. Jacobi.") The case involved the question of right a salmon fishery in the river Baune, in Ulster, Ireland, and had nothing to do with the Thames in London. What is quoted in *Sterens v. Railroad*, as having been "said," in that case, was something said either by the reporter himself or by the court *arguendo*.

The opinion in *Sterens v. Railroad* particularly refers to *Attorney-General v. Chambers, 4 De G., M. & G. 206*, for the purpose of showing that the riparian owner has no property rights, and, of course, that he has not the most valuable of these rights, that of adjacency to the water, which is the right which we now contend for. The syllabus shows the only point decided in this case, and is as follows, viz.: "In the absence of all evidence of particular usage, the extent of the right of the crown to the seashore, landwards, is *prima facie* limited by the line of the medium high tide between the springs and the neaps." The opinion refers to vol. IV., p. 99, of *The Law Magazine and Law Review*, and then says: "We are also to bear in mind that the seashore [in England] could be granted in gross—that is, without being parcel of the upland." In the article in the magazine I find this statement: "The proprietor of the adjacent soil has sometimes been said to be the only person to whom the foreshore can be granted out, and in America this seems to be the settled doctrine; but here, as has been stated by high authority, 'it may belong to a subject, and to him in gross, which possibly may suppose a grant before time of memory,'" and refers to *Hargrave's Law Tracts 26*. The opinion says: The royal right in tidal waters is "admitted in its fullest extent in the conspicuous modern cases—*Lord Advocate v. Sinclaire*, 11 Fost. L. R. 1 Scotch App. 172; *Gaun v. Free Fisheries of Walsby*, 11 H. of L. Cas. 121. If there is anything in these cases that militates against the property rights of the riparian owner in the adjacent water, examining the cases will disclose it.

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The lord chancellor (Chelmsford) in *Lord Advocate v. Sinclair of Foss*: * * "According to the familiar law in Scotland, salmon fishings are *inter regalia*, and *prima facie* crown property, and a subject can only establish his right to them against the crown by clear proof of title in himself." Thus it appears that the case was one in relation to the "law in Scotland," that it was one relating to the right to a fishery, and was decided under a Scotch statute relating to prescription.

Gaun v. Free Fishers of Whitstable, 11 H. of L. Cas. 192.

This was an appeal brought under the common law procedure act. The action was debt, the plaintiffs claiming the sum of one shilling from the defendant as a toll or anchorage due in respect to his vessel having cast its anchor within the limits of the plaintiff's free fishery in Whitstable Bay. The defendant pleaded never indebted. The respondents (plaintiffs) claimed that, by virtue of the grant to them of the fishery, they were entitled to demand toll for anchorage of every vessel casting anchor, as they had done immemorially. The court held that the original title of the crown to the beds of navigable rivers &c. was for the benefit of the subject, and could not be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm; that the right to anchor is a necessary part of the right of navigation; and that, therefore, the respondents, as grantees of the crown, necessarily took subject to the right, and were not entitled to the toll. The case did not decide that the beds of navigable rivers belonged to the crown. They assumed that, and decided that the crown's ownership was for the use or benefit of the subject, and if granted away, the grant was not to derogate from the rights of the subject.

There is but one answer to these questions—but one answer that renders these enactments constitutional—and that is, that the owners of lands along tide water have the property rights of adjacency to the water, which this state thus emphatically admits it is bound to respect. The state owns all the tidal water and all the soil under it, and the owner has the property right of access to that highway—it is the chief value of his land.

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This right is property. The house of lords say so. The justices of the supreme court of the United States say so. The authors of treatises say so. The judiciary of New Jersey has said so. The legislature of New Jersey, by these enactments say so; and, I submit, the court is bound to give this significance to the statute of 1869, that it may be constitutional.

The opinion refers to *Gould v. Hudson River R. R. Co.*, 5 Seld. 522, affirming the supreme court, 12 Barb. 616, which decides that the riparian owner on the Hudson river below tide water has no claim for damages against the railroad company for constructing their railroad in the river in front of his land. They are not referred to, but this case was followed by *Tillotson v. Hudson River R. R. Co.*, 5 Seld. 575, and *Getty v. Hudson River R. R. Co.*, 21 Barb. 617.

Land titles in New York and Pennsylvania are derived from the state; in the western states, from the United States; in New Jersey, from the crown of Great Britain. In *Cox's Institutes of the English Government*, pp. xlv., xlv., we are told that the legislative power of the crown over colonies differs materially from the crown power over domestic legislation, and that as to colonies, it is sufficient to establish local legislation. See, also, pp. 30, 31; 1 Bla. Com. 107, 108; and Cowp 204, where Lord Mansfield asserts the king's legislative authority over colonies. *Christian's notes to 1 Bla. 107*. Chief-Justice Green, in *Gough v. Bell*, 2 Zab. 441, in speaking of the local common law of this state giving the riparian owner the right to wharf out, says it may possibly have had its origin in some early ordinance or statute, which is now lost.

And when we couple what Lord Hale said (*Harg. Law Tracts* 277) as to the propriety of the crown, even in England, recognizing the title of the land-owner to lands left by the sea, with this power of the crown to legislate for the colonies, it is very probable that the local common law, which we will abundantly show to exist, did originate in an ordinance from the crown, as was the case in Massachusetts, where, by an ordinance in 1681, it was provided that the proprietor of land adjoining the sea should hold to low-water mark. The ordinance was annulled, but the

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local common law remains, and such is the law to-day in Massachusetts and in Maine. 2 Zab. 468, 469; *Storer v. Freeman*, 6 Mass. 435; *Sale v. Pratt*, 19 Pick. 191; *Angell* 225, 226. At all events, a local common law exists here, giving the riparian owner rights to the adjoining waters, which did not exist in the state of New York, and therefore *Gould v. Hudson River R. R. Co.* and the cases that followed it, are not law for this state.

The chief-justice, in *Stevens v. Railroad*, to show that a riparian owner has no property rights on navigable water, cites *Wilson v. Blackbird Creek*, 2 Pet. 245, as deciding that a statute of Delaware, authorizing one of its citizens, for the purpose of improving his lands, to close the mouth of a navigable creek, was constitutional, and that the act done under it was legal. It appears that what the case did decide was that the act was not in conflict with the power of congress to regulate commerce; that it was "an affair between the government of Delaware and its citizens," and that it "must be supposed to abridge the rights of those who have been accustomed to use it;" that is to say, a wrong or injury which the United States could not redress, and which must be left to the courts of Delaware.

Chief-Justice Beasley refers to *King v. Smith*, Doug. 441, to sustain the majority view. It was this: The defendants were indicted for cutting down one of several piles making a tow-path in the Thames, placed there by the city of London. The question submitted was whether the title to the bed of the river was in the city or in the owners of the adjoining ground. The crown having given the city of London a grant of the Thames, the title was held to be in the city. The case in no manner conflicts with the right of the riparian owner at common law to have adjacency to the water, which is the one right the common law gives.

We have thus far insisted that the riparian owner has the property right of adjacency to the water, by force of the common law. It is settled by all the cases in New Jersey, that when the shore is reclaimed, the reclaimer has title. The chief-justice, in *Stevens v. Railroad*, recognizes the local common law; says: "That in order to enable the riparian owner to fill in or wharf out below the line of high water, it was absolutely necessary to

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adopt some principle different from those of the common
 * * * It was indispensable to invoke the sanction of a
 usage variant from the common law." All we claim is,
 the common law secured to the riparian owner adjacency to
 water.

But the chief-justice then insists that this local common
 only gave the riparian owner a property right or title to
 reclamation when he, with the inactive acquiescence of the state,
 had made it, and did not give him a right to make the reclama-
 tion. In that proposition we cannot concur. The state, when
 acting in the capacity of an owner of merchantable property,
 assumes the characteristics of a citizen, and the common law,
 itself, without invoking the aid of a local custom, would go
 far as the chief-justice makes the local common law extend,
 the local common law, by becoming common law, would
 exist, while it is admitted to exist. The common law would
 give the riparian owner a property right to such reclamation
 the party having the title had acquiesced in his making.

Mr. William Griffith, in 1821, thus states the riparian right
 and local custom in New Jersey :

"Persons whose lands are bounded on rivers in New Jersey
 by titles derived under the grant of Charles II. to his brother
 James, Duke of York (March, 1663-4), have always claimed
 and exercised the right of several fishery in front of their lands
 and this as well in fresh-water streams and rivers as on rivers
 where the tide flows." 4 Griffith L. Reg. 1286. "It may be
 stated generally, therefore, that in New Jersey the owners of
 lands bounded on rivers or waters, of whatever description, have
 the exclusive legal right to the possession and enjoyment of
 fisheries established in front and on their own shores." 4
 1288. "This species of property, from the earliest times, has been
 the subject of exclusive enjoyment and alienation, like any
 other." Id. 1290, note 1; Arnold v. Munday, 1 Hal. 1.

The opinion in *Stevens v. Railroad* says that it appears, in
City of Georgetown v. Alexandria Canal Co., 12 Pet. 94, that
 congress authorized the erection of a canal in the Potomac
 although admittedly injurious to the riparian owners. T

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case was this: The bill was filed by the city of Georgetown, complaining of the Alexandria Canal Company, and alleging that it was engaged in constructing an aqueduct over the Potomac river at Georgetown, within its corporate limits, immediately above and west of the principal public and private wharves of the town; that the Potomac, above and below the aqueduct, continuously outward to the sea, was a public navigable highway; and that the free use of the river was secured to all the people residing on its borders or interested in its navigation, by a compact between the states of Virginia and Maryland in 1785; that the canal company had constructed a massive stone pier, and were about to construct others; that by the use of clay and earth, thrown in to make close certain coffer-dams used by the company in the construction of the piers, the harbor had been injured &c. The questions involved were: 1. The power of congress to authorize the work, which was decided in the affirmative. 2. Whether congress had authorized it, which was decided the same way. 3. Whether the work was a nuisance, which was decided in the negative, for the reason that the work was authorized. 4. Whether, in case it were a nuisance, the complainants (corporate authorities of Georgetown) had any right to institute the suit to enjoin it, which was decided in the negative, for the reason that they had not averred or proved that they were the owners of property liable to be affected by the nuisance, if such, and that were, in fact, affected injuriously.

The opinion in *Stevens v. Railroad* also refers to *Glover v. Powell, 2 Stock. 211*. In 1760, the legislature of New Jersey authorized meadow-owners to build a dam at the mouth of Little Timber creek, for the improvement of their meadows. (The creek emptied into the Delaware, and the tide ebbed and flowed in the creek, and the dam prevented the flow of the tide upon the meadows). In 1854, the legislature declared the creek a public highway, and authorized the town committee to remove the dam (erected nearly one hundred years before). The bill was filed on behalf of the land-owners, to enjoin the removal of the dam. The chancellor held that the act of 1760 was valid;

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that the legislature had a right to authorize the dam, there being "nothing in the case to show that it ever was a navigable stream, or that a boat of any size ever passed up it," (p. 227). That the act of 1854 violated the United States constitution, impairing the obligation of a contract. That it violated the New Jersey constitution, by taking private property &c. without compensation—rights having vested, and valuable property having been acquired under the act of 1760. That a diminution of value of property was a taking of it. The defendants also insisted that the authority to erect the dam was a revocable license; but the court did not agree with them, saying (p. 228): "The construction * * * contended for by the defendants cannot be admitted." The complaint was not that the dam injured any riparian owners, but that it was an obstruction to navigation.

The case of *Gough v. Bell* was not affected by the wharf act of 1851. That action was commenced in 1843, was tried December, 1844, and set aside. 1 Zab. 157. The second trial was November, 1848, and a case was reserved and decided July term, 1850, and this final judgment was affirmed June term, 1852. 3 Zab. 624.

Justice Elmer says: "Directly after the first decision of the supreme court in this case (1 Zab. 167), the legislature, by an act approved March 9th, 1848, provided that it shall be lawful for the owner and holders of all docks and wharves to use, possess and keep in order the same, and to demand and recover wharfage and dockage for the use thereof. By a subsequent act, approved March 18th, 1851, passed after the final decision which is now before us, shore-owners are empowered to build on or otherwise improve the same to low-water mark, without restriction, and below that line by obtaining a license in the manner therein prescribed. These acts conform to the interpretation of the common law adopted by the court, and serve to show the necessity that was felt to protect rights acquired under the usage before supposed to be legal." 3 Zab. 667. Judge Valentine, who only recognized the qualified right of the riparian owner, as stated, manifestly considers that he has rights under the act

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of 1851. *Page 708.* Of course the right to wharf carries with it the right of adjacency. *Bell v. Hull and Selby R. R. Co.*, 6 *M. & W.* 699; *Keyport Steamboat Co. v. Farmers Trans. Co.*, 3 *C. E. Gr.* 516.

The wharf act of 1851 (*P. L. of 1851 p. 71*) was repealed, as to the lands and waters in question, by the act of 1869. *P. L. of 1869 p. 44 § 3.* For its repeal, it gives the riparian owner the compensation of pre-emption (*P. L. of 1869 p. 50 § 8*), and payment for all his rights and interest in the lands and water in front of him, in the event of his not taking the grant (*P. L. of 1869 p. 51 § 13*); but now it is proposed that the state repudiate the compensating provisions of the repealing act. The act of 1869 (*P. L. of 1869 p. 45*) says: "Said repeal [of the act of 1851] shall not be construed to restore any supposed usage, right, custom or local common law founded on the tacit consent of the state, or otherwise, to fill in any land under water."

The opinion in *Stevens v. Railroad* holds the statute of 1851 to confer on the riparian owner a mere revocable license. I have given my reasons for dissent from this conclusion. The following are the two cases adduced to support the position. The court will judge whether they do so. The first case is *Susquehanna Canal Co. v. Wright*, 9 *Watts & S.* 9. This case involved the construction of an act of the Pennsylvania legislature, made in 1803, whereby it was enacted that Wright, his heirs and assigns, "shall have the liberty, and are hereby authorized and empowered to lead off on the said river [Susquehanna], a part of the water out of the said river, for the supply of such water-works, as he, the said William Wright, his heirs and assigns, may see fit to erect thereon, * * * provided always, that the said William Wright, his heirs and assigns, in building such dam and leading the water out of said river, do not infringe on or injure the rights and privileges of any individuals, nor in any wise impede or obstruct the navigation of the same." In afterwards (in 1836) incorporating the Susquehanna Canal Company, the legislature provided for ascertaining any damage occasioned by any injury to any rights, privileges or property conferred on Wright by the act of 1803. The court held that the proviso in

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the act of 1803 was an "express saving of the public navigation, and, consequently, of the ancillary right to improve it. In other words, the privileges conferred by the act of 1803 were expressly subject to public navigation, and the right of the legislature to provide for its improvement by the canal; so that Wright had no "rights, privileges or property" under his grant that were impaired; or, rather, what he considered an injury was the exercise of a right reserved.

The other case referred to is *New York and Erie R. R. Co. v. Young*, 33 Pa. St. 175. The injury complained of was caused by throwing dirt over the bank of the Susquehanna river, as to make an embankment along the shore; and by carrying out the bank at one place where there was a natural projection called the pond, so as to divert a portion of the water from the plaintiff's mill, and fill up the channel to the same. The court say (p. 180): "The injury complained of by the plaintiff below was not for a taking of his property for the construction of the defendant's road, but for a consequential injury to it, resulting from the location and construction of the road and which ensued, not from any wanton disregard of his rights or negligence in doing their work, but from the location and construction alone. * * * It has been held by this court * * * that the grantees of such a franchise have the same power that existed in the state, and may exercise it, subject only to such restrictions as are imposed in the grant, and that they are subject only to the same liability, unless otherwise declared. Such grants are always supposed to be for the public benefit and to be exercised with that view by the corporation rather than by the state itself. In the cases cited, the doctrine has been distinctly held, and is the settled law of the land, if anything can be settled, that unless the act of incorporation provides for it, consequential damages are not recoverable from a railroad or other improvement company in constructing or maintaining their works. * * * The act of assembly does not require the company to pay consequential damages, and none were recoverable from them."

We submit that no case can be found that holds that whe

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the state has granted a power to be executed by private expenditure, thereby creating or enhancing the value of property—that the grant can be revoked after it is accepted. Of course, if this statute is only declaratory of a right given by the local common law, the repeal of the act does not affect the right.

Mr. John W. Taylor, for appellants.

I. The object of this suit is to quiet title to the lands in the bill described &c.

II. The suit is maintainable both on the general principles of equity jurisprudence and under the act of 1870. *Rev. p. 1189.*

On general principles of equity. See *Story's Eq. Jur.* (12th ed.) § 700, and note 4, § 711 a; *Wait's A. & D.* pp. 182, 189, 219, 683; *Bispham's Prin. of Eq.* § 575; *High on Inj.* (1st ed.) §§ 269, 270, 367; *Hilliard on Inj.* (3d ed.) p. 249 § 125; *Tucker v. Kenniston*, 47 N. H. 267, 270-2, and cases there cited.

(2) Under the statute.

The act is remedial, and should be construed liberally. See *Holmes v. Chester*, 11 C. E. Gr. 79; *Bogert v. Elizabeth*, 12 C. E. Gr. 568, 571; *Southmayd v. Elizabeth*, 2 Stew. Eq. 203; *Ludington v. Elizabeth*, 5 Stew. Eq. 159.

The limitations put upon the scope of the act in *Lembeck v. Jersey City*, 4 Stew. Eq. 255, do not exclude this case.

III. (1) The defendants (respondents in this court) answered to the merits of the bill, and thereby (without objection) submitted to the jurisdiction of the court, and the objection, after answer and on the motion for injunction, comes too late. 1 *Dan. Ch. Pr.* (4th ed.) 550 § 555 and note 3; *Story's Eq. Pl.* § 485; *Mitf. Eq. Pl.* (by Jeremy) 153; *Cooper's Eq. Pl.* 160-2; *First Cong. Soc. in Raynham v. Trustees*, 23 Pick. 148.

2) The objection should have been raised by demurrer to the jurisdiction—1. In writing; 2. Within the time limited by law, and 3. With an affidavit annexed.

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(3) This objection is in the nature of a demurrer *ore ten* which can be entertained—1. Only at the hearing, and 2. Wh there is a demurrer on the record. 1 *Dan. Ch. Pr.* (4th e 588; *Story's Eq. Pl.* § 464.

(4) A trial at law is unnecessary.

The essential facts upon which the right depends are estab lished or admitted, and the principles of law are settled; a the court may apply the principles as settled by the courts of law, to these facts, and allow the injunction. *Hackensack Imp. Co. v. Midland Ry. Co.*, 7 *C. E. Gr.* 94; *Beach v. D. & Canal Co.*, *Id.* 130.

(5) If a trial at law is necessary, it may be had pursuant to the act, on the application of either party. See *Rev. p.* 1190 § 5.

IV. The title of the appellants (complainants below), or the American Dock and Improvement Company, is clear on the facts.

(1) The act of 1860 (*P. L. of 1860 p. 21*) authorizes the Central Railroad Company "to extend their railroad from some point in their track in the city of Elizabeth to some point or points on New York bay, in the county of Hudson, at or south of Jersey City" &c., with all the powers of the former charter, and provides that nothing therein "should be construed to prejudice the claims of riparian shore-owners" &c.

(2) There can be no doubt that the extension was authorized to some point or points on tide water.

a. The word "on" does not mean "to."

Notice the meaning of "on," 3 *Zab.* 634.

b. A point south of Jersey City could hardly be limited to the banks or *ripa*.

(3) The railroad company became the owners of the *ripa* in 1863, under the requirement to refrain from prejudicing the claims of riparian owners.

a. The act left a discretion in the company as to the mode of satisfying or extinguishing the claims of such owners.

b. The state recognized that there was something in these "claims," or it would not have provided against injury to them.

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c. In requiring the company to refrain from prejudicing the "claims" it necessitated large expenditures.

(4) The state has solemnly recognized the Central Railroad Company's ownership of all the lands it acquired, with all the rights incident to such ownership.

(5) The rights of adjacency, reclamation &c. were incident to the ownership—1. At common law generally; 2. Under the local common law of New Jersey, 3. Under the "wharf act."

(6) It is respectfully submitted that the opinion of the majority of the court in *Stevens v. Paterson and Newark R. R. Co.* was not called for by the pleadings, and should not be regarded as a binding decision.

(7) The English decisions (cited and quoted in Mr. Frelinghuysen's brief, and in the pamphlet comprising charters &c.) are not founded on statute. The rights held to be in the riparian owner, existed by common law, and are recognized by statute—by providing a statutory mode of obtaining compensation when those rights are taken away or impaired—by the exercise of the powers of eminent domain. See *1 Redf. on Railw. (4th ed.) 309*; *Godefroy & Shortt on Railw. 195*.

(8) The American Dock and Improvement Company had a right to acquire the lands in question under its charter, and to improve and reclaim them.

(9) Having the right to do so, it did acquire the lands in question (*i. e.*, the lands owned by the Central Railroad Company) October 15th, 1866, and has ever since held them legally or equitably; for even after the conveyance to Mr. Johnston, in trust, the dock company continued to hold the equitable title, which, in this court, is as good and as much entitled to recognition and protection as the legal title would be in a court of law.

V. The West Line grant was void.

(1) The state did not own the lands at the time of the alleged grant; the full title being in the dock company, as hereinbefore shown.

(2) The attempted grant impaired the obligation of a contract,

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and was the taking of private property without compensation and was therefore void.

(3) Even if the shore-front had not been reclaimed, the plainants had a right of pre-emption under the act of 1861.

(4) The act of February 29th, 1874 (§ 9), was not a grant of land, but only a permission or license to acquire lands and water that might "happen to come within the location of route" of the West Line road, if and when extended, and which should belong to the state, on complying with the riparian laws and on such terms as might be imposed by the riparian commissioners. *21 Am. L. R. 131-2.*

VI. The objections in regard to parties are not well founded.

(1) The American Dock and Improvement Company claims the equitable title to the reclaimed lands, Johnston, the trustee holding only the bare legal title, and himself having a suit pending in the federal courts, rendering it proper to make him defendant in this suit.

(2) The Central Railroad Company and its receiver are shown by the bill to have an interest in the premises and in the question.

The agreement or covenant in the grant of 1874, for a conveyance or release of the premises to it, in a certain contingency makes it proper that the railroad company and receiver should be joined as complainants.

(3) Both the railroad company and Van Horne have an interest jointly in the *ripa*, three feet wide. The bill (*pp. 4, 5*) states that the release by the railroad company to Van Horne was only for the reclaimed portion of the premises. The language is: "And the said company agreed that it would release its interest in that part west of Henderson street, (afterwards J Street avenue was substituted) which might be filled in" &c. The agreement was fulfilled by the release subsequently made.

VII. But all the parties in interest are before the court and the decree made in the cause will affect and bind them all. Johnston, as naked trustee, should be joined with the dock company as complainant, and Van Horne made a defendant.

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ick out altogether, the court will order it to be done at the per time without prejudice to the right to an injunction. See *ner v. Loper*, 10 C. E. Gr. 475; *McIntyre v. R. R. Co.*, 11 425; *Simon v. Townsend*, 12 Id. 302.

VIII. It is insisted, however, on the part of the trustees, and the chancellor holds, that the trustees cannot be sued, because they are the agents of the state, while the state itself is not subject to a suit, because it is a sovereign. It is submitted that the view of the learned chancellor is erroneous.

(1) In the first place, the chancellor bases his opinion, in part, at least, on the assumption that a decree for specific performance is prayed against the state or the trustees. There is no such prayer.

(2) While it is conceded that the state cannot be prosecuted directly by a citizen in its own courts, without its consent, it is submitted that the cases cited by the chancellor in support of the view that the trustees cannot be sued, show, on critical examination, that they are amenable to suit. See, especially, *Michigan State Bank v. Hastings*, 1 Doug. 225; *Same v. Hammond*, Id. 527, (both of which overrule *Michigan State Bank v. Hastings*, Walk. Ch. 9); *Osborn v. United States Bank*, 9 Wheat. 251.

(3) If the trustees for the support of public schools are not liable, because they "are the mere agents of the state," are they not, by parity of reason, precluded from suing in their own names?

They have always brought suits in their own names, and not in the name of the state, and no one has ever questioned their right; and yet their capacity to be sued is as unquestionable as their power to sue in their own names.

(4) They are a corporation, consisting of the governor, president of the senate, the speaker of the house of assembly, the attorney-general, the secretary of state, and the comptroller (including the chief magistrate of the state, and its highest law officer, the proper representatives of the sovereignty), "and their successors in office, to be known by the name, style and title of

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‘The Trustees for the Support of Public Schools.’” (~~Rev.~~ *Rev.* p. 1081 § 65).

The name of the corporation is “the very being of its ~~con-~~stitution.” *Ang. & Ames on Corp.* § 99. See, also, *Kyd on Corp.* 68, 70; 2 *Kent’s Com.* 224; *Rev.* p. 175 § 1; 3 *Stew. Eq.* 667; 4 *Id.* 290; *High on Inj.* (2d ed) §§ 1308–9; *People of N. Y. v. Canal Board of N. Y.*, 55 *N. Y.* 390.

IX. The injunction should stand until final hearing. The matters involved are closely and indissolubly blended with the merits. If the complainants show ultimately, when the evidence is all in, all the matters in issue fully examined, and the law applicable thereto thoroughly considered, that the prayer of the bill ought to be granted, they will likewise show that a preliminary injunction should have been granted and continued. *High on Inj.* §§ 269, 270; *Freeman on Ex.* § 438; *Holmes v. Chester*, 11 *C. E. Gr.* 79; *Johnson v. Vail*, 1 *McCart.* 423.

There can be no doubt that a sale in the case at bar would throw a cloud on the complainant’s title, considering the fact that it is founded to a large extent on matters *in pais*, and not on a record title. See *High on Injunc.* §§ 269, 270; *Freeman on Ex.* § 438; *Pettit v. Shepherd*, 5 *Paige* 493; *Oakley v. Trustees*, 6 *Paige* 262; *Budd v. Long*, 13 *Fla.* 288; *Wilson v. Butler*, 3 *Munf.* 559; *Downing v. Mann*, 43 *Ala.* 266; *England v. Lewis*, 25 *Cal.* 337; *Annis v. Myers*, 16 *How. (U. S.)* 492; *Croffer v. Coburn*, 2 *Curt. C. C.* 465; *McCulloch v. Hollingsworth*, 27 *Ind.* 115; *Bach v. Goodrich*, 9 *Rob. (La.)* 391.

Mr. John P. Stockton, Atty-Gen., for the respondents.

I. The complainants are estopped by the order of this court, by the bond and by the circumstances in the answers set forth, from asking a stay of the sale in respect to the alleged superior title. The said bond is a pledge to the court and the trustees, and a consent that the title the trustees sold under the decree should be sold again, and not another or a different title.

The trustees having obtained a decree to foreclose the ~~West~~ *West* Line mortgage, and having issued thereon an execution, ~~and~~ *and*

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ing advertised the property for sale, were stayed by injunction out of the federal court, from May 5th, 1876, till November 30th, 1878, when the injunction was declared to be null for want of prosecution. The property was sold to Lloyd Champlin, December 26th, 1878. January 6th, 1879, the receiver (Lathrop) filed a petition in the New Jersey court of chancery to set aside the sale. April 7th, 1879, the New Jersey court of chancery made an order reciting that the court, on the petitions of the receiver of Central company (Lathrop) and receiver of West Jersey company (Larned), had made an order to show cause why the sale should not be set aside and for the hearing thereof, and then ordered that the "petitioners" should furnish a bond "conditioned that the mortgaged premises shall, on a resale thereof, bring had under the said execution, bring the amount that shall be due for debt, interest and costs on the said execution, together with the lawful expenses of both of said sales," and cites that bond was given and the order for sale set aside. The bond is not in the form of an agreement. But, in equity, a bond conditioned that it shall be void if a certain act is done, is an agreement to do the act. Nor will equity permit the payment of the penalty of the bond to be performance of such agreement, but will require a specific performance of the agreement. *Logan v. Weinholt*, 1 Cl. & Fin. 611-623, 630, 633; *Burrows v. Gore*, 6 H. of L. Cas. 950; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *Story's Eq. Jur.* § 715.

When a man covenants to do a certain thing, it is necessarily implied that he will not willfully incapacitate himself from doing it. *McIntyre v. Belcher*, 14 C. B. (N. S.) 654; *Stirling v. Maitland*, 5 B. & S. 840. Stipulations which are necessary to make a contract reasonable are implied, in respect of matters concerning which the contract manifests no contrary intention. *Jones v. Gibbons*, 8 Exch. 922; *Field v. Lelean*, 6 H. & N. 617; *Hutton v. Warren*, 1 M. & W. 475. An injunction is the act of the party applying for it. *Doughty v. Doughty*, 2 Stock. 347, 350; *West Jersey R. R. v. Thomas*, 8 C. E. Gr. 440; *Platt on Cov.* 322; 2 *Sugd. on Vend.* 476; *Selby v. Chute*, 1 Brownl. 23.

Words of condition effectual to create estoppel. *Big. on Est.*

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295, 300, 303. Condition of a bond which does not re-appointment of collector, but merely is conditioned that he shall act faithfully as collector, estops him from saying he was not collector. *Billingsley v. State*, 14 Md. 369. The bond is a contract as to a sale. *Simmond's Estate*, 19 Pa. St. 440.

In 5 East 271, A covenanted with B to collect certain debts and to settle all differences by leaving the adjustment to an arbitrator. B, by marriage, incapacitated the arbitrator from making an award to bind her. Gross, J., said: "We cannot arrest judgment if, upon the whole record, it appears that the defendant has committed a breach of the covenant." Lord Ellenborough, C. J., said: "That if a party made a covenant, then disable himself from performing it, the covenant will be broken." *Lovering v. Lovering*, 13 N. H. 513; *Hopkins v. Young*, 11 Mass. 306.

Where a party stipulated to convey an estate to another on a future day, and in the meantime conveys it to a third person, he is guilty of a breach of his stipulation. *Heard v. Bowers*, 4 Pick. 455; 2 Wait's Act. and Def. 405; 1 Bac. Abr. (Am. ed.) 307; *Vinyor's Case*, 8 Co. 82; *Warburton v. Storr*, 4 B. & C. 103.

Whether the submission be by a judge's order or instrument in writing, the parties, it may be equally revoked before it is made a rule of court; but a revocation afterwards would be a contempt. 1 Bac. Abr. (Am. ed.) 307, cites *Milne v. Gratrix*, 7 East 608; *Caberland v. N. Yarmouth*, 4 Me. 459; *Haskell v. Whitney*, 1 Mass. 47; *Frets v. Frets*, 1 Cow. 335; *Russell on Arb.* 57; *Law Lib.* 97; *Platt on Cov.* 55, 58; *Harcourt v. Ramsbottom*, 1 Jac. & Walk. 511.

Chancellor Williamson said, in *Doughty v. Doughty*, 2 Sto. 347:

"That when a court of equity has, by the solicitation of a petitioner invoking the aid of the court for his relief, interfered with the legal rights of another and impaired his legal remedy, it is the duty of this court to protect the party whose rights have been thus interfered with."

Chancellor Zabriskie said, in *West Jersey R. R. Co. v. Thorpe*,

8 *C. E. Gr.* 440: "A court of equity would never set aside an **award** because not delivered in time, when the delivery was restrained by injunction at the suit of the party making the objection."

In *Stirling v. Maitland*, 5 *B. & S.* 840, Cockburn, C. J., said: "I look on the law, that if a party enters into an arrangement **which** can only take effect by the continuance of a certain existing **state** of circumstances, there is an implied engagement on **his part** that he shall do nothing of his own motion to put an **end to** that state of circumstances, under which alone the arrangement **can** be operative." *Allamon v. Albany*, 43 *Barb.* 34.

In *M'Intyre v. Belcher*, 14 *C. B. (N. S.)* 654: Where an agreement for the sale of the good-will of a medical practice, stipulated for value, *inter alia*, that the vendors should not, **within** ten years from the date of the agreement, practice at the *locus in quo*, or within ten miles, the purchaser to pay the vendors, at the end of each of the first four years, one-fourth of the **gross** earnings, provided they did not fall below £300, it was held that there was an implied contract by the purchaser to **carry** on the practice. *Randall v. Lynch*, 12 *East* 179; *Logan v. Wembolt*, 1 *Cl. & Fin.* 630; *Philadelphia, Wilmington and Baltimore R. R. Co. v. Howard*, 13 *How.* 307. See, also, *Big. on Est.* 30; 2 *Smith's Lead. Cas.* 795.

II. There is no specific equity stated in the bill to give the **court** jurisdiction. It does not fall within the jurisdiction of a **court** of equity to try the validity of mere legal titles. There **must** be some specific equity to give the court jurisdiction. A bill to establish a legal title is never entertained unless there are **particular** circumstances stated in it, showing the necessity of **the** court's interposition, either for preventing multiplicity of **suits** or for an injustice irremediable at law; nor by the ordinary jurisdiction of this court, will a suit lie for that purpose, **by the** introduction of an allegation of clouding the title, unless the **possession** of the plaintiff has been previously disturbed by **legal** proceedings on the part of the defendant.

Bills to remove clouds on a title are a branch of the *quia timet*

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jurisdiction of courts of equity. *Story's Eq. Jur.* §§ 700, 701; *Bogert v. Elizabeth*, 12 C. E. Gr. 568; 5 Ves. 618; 1 Madd. 135, 140, note.

Lord Thurlow observes, in *Weller v. Smeaton*, 1 Bro. C. C. 573: "Most of the cases on the subject had been looked into, and it was found that in no instance, except that of *Bush v. Western*, Prec. Ch. 530, had this court ever interfered in a mere question of right between A and B, they having an immediate opportunity of trying the right at law, which would be definitive." *Jersey City v. Lembeck*, 4 Stew. Eq. 272; *Smith v. Collyer*, 8 Ves. 90; *Duval v. Waters*, 1 Bland Ch. 585; *Stark v. Starrs*, 6 Wall. 408; 2 Sch. & Lef. 208; 15 Cal. 257; *Waddell v. Beach*, 4 Hal. Ch. 299; 1 Stock. 795; *De Groot v. Receivers &c.*, 2 Gr. Ch. 199; *Welby v. Duke of Rutland*, 6 Bro. P. C. 575; *Haythorn v. Margerum*, 3 Hal. Ch. 324; *Stewart v. Coulter*, 4 Rand. 74. See, also, 2 Mod. 234; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Overseers of Poor v. Hart*, 3 Leigh 3; *Hoboken Land and Improvement Co. v. Hoboken*, 4 Stew. Eq. 461; *McClave v. Newark*, 4 Stew. Eq. 472; *Lehigh Valley R. R. Co. v. McFurlan*, 4 Stew. Eq. 754; *State Maryland v. Jarrett*, 17 Md. 330; *Shepley v. Rangley*, Davis 242; *Cox v. Clift*, 2 Comst. 118; *Sullivan v. Finnegan*, 101 Mass. 447; *Clouston v. Shearer*, 99 Mass. 209; *Weller v. Smeaton*, 1 Cox C. C. 102; 2 Waterman's Eden on Injunc. 423.

III. The government cannot be sued except by its own consent, given by statute. Consequently, its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends, cannot be enjoined, as the courts possess no power to enforce their decree against it. *Loder v. Baker*, 10 Vr. 50; *Montgomery v. Trenton*, 11 Vr. 89; *Schooner Exchange v. McFadden*, 7 Cranch 136; *Hill v. United States*, 9 How. 386; *State of Georgia v. Stanton*, 6 Wall. 75; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Hosner v. De Young*, 1 Tex. 769; *Delafield v. State of Illinois*, 2 Hill (N. Y.) 159, 160; *Garradnis v. Bright*, 1 Barb. Ch. 157; *Walker v. Wells*, 17 Geo. 547; 16 Vin. Abr. 566 pl. 16, 23; Id. 567 pl. 30, 32, 33; *Johnson v. Towsley*, 13 Wall. 73; *Trustees of Public Schools*

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City of Trenton, 3 Stew. Eq. 683; *Duke of Norfolk's Case*, 2 Yer 139 a; *Thompson v. Commrs. of Canal Fund*, 2 Abb. r. 248; *Frewin v. Lewis*, 18 Eng. Ch. 253; *State v. Governor*, 1 Dutch. 351; *People v. Navarroe*, 22 Mich. 1.

IV. The bill presents no case for an injunction. A thing being done in good faith for the public benefit will not be enjoined, even at the instance of the attorney-general. Nor will the court in such cases interfere until the rights of the parties are settled at law. *Morris and Essex R. R. Co. v. Pruden*, 5 C. E. Gr. 537; *Allen v. Freeholders of Monmouth*, 2 Beas. 68; *High on Injunc.* p. 10 § 13; *Society &c. v. Butler*, 1 Beas. 199; *Sugar Refining Co. v. Jersey City*, 11 C. E. Gr. 207; *Coe v. Midland R. R. Co.*, 1 Stew. Eq. 27; *Chicago v. Frary*, 22 Ill. 34; *Montgomery v. Trenton*, 11 Vr. 91; *Rex v. Terrott*, 3 East 506; *Amherst v. Somers*, 2 T. R. 372; *Attorney-General v. Hill*, 2 M. & W. 160; *Chicago v. Miller*, 80 Ill. 384.

V. Complainants are not entitled to an injunction, because they are in laches. If a party is guilty of laches, or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief; more especially where a party, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expense and enter into engagements and contracts of burdensome character. *Joyce on Injunc.*

The knowledge of counsel in a particular transaction is notice to his client. *May v. Leclaire*, 11 Wall. 217.

Mr. R. Gilchrist, for respondents.

I. The English cases, cited to show that there are in England property rights of adjacency, and of access, do not show this, but the contrary; all of them being cases where the decisions depended on statutory provisions, securing compensation to a riparian owner though he was not injured, but only "injuriously affected;" or compensation was given outright by statute. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. (3

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Exch.) 306; *Re Penny*, 7 *El. & B.* 665; *Bordentown v. and Amboy R. R. Co.*, 2 *Harr.* 319, 320; *Borden v. R. Gr.* 473; *Barney v. Keokuk*, 4 *Otto* 324.

II. The *Stevens Case*, 5 *Vr.* 537, 554, is not open observation that the questions it decided were not up, or opinions were extra-judicial. This case arose out of the refusal of an injunction by Chancellor Zabriskie to Stevens. The question of the right must be tried at law first. The action which was the subject of the decision in 5 *Vr.* 537, 554, was brought for the very purpose of deciding the question decided. *Stevens v. Person and Newark R. R. Co.*, 5 *C. E. Gr.* 135.

III. Even if the *Stevens Case*, 5 *Vr.* 537, 554, did not decide the complainants of an injunction, that same case in equity, 5 *C. E. Gr.* 126, a year and a half before, is decisive that there should be no preliminary injunction. Chancellor Zabriskie refused an injunction in that case on the ground that the title was unsettled. Now, it is settled against the claim of complainants to any of their rights. The chancellor refused the injunction in a case almost all fours with this, on the ground that the title was doubtful. On what ground can an injunction now be granted when the highest court of the state has decided that the owner has no property rights, and that the state had title and power to make a grant to a stranger?

IV. The covenant is void. The main ground on which the point rests is, that two years before the covenant was made by the riparian commissioners, the state by the ninth section of the act of February, 29th, 1872 (*P. L. of 1872*, p. 313), vested the moneys to be paid for the West Line grant, in the trustees for the support of public schools, and appropriated the same to that fund; and on the 19th of March, 1872, when the grant was authenticated and its boundaries fixed by the riparian commissioners, and the mortgage given to the trustees, the title to the mortgage was in the trustees.

The answer insists that the deed in which the covenant was contained is void, as impairing the grant to the West Line by which trustees claimed—all public grants containing an

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nt not to re-assert title. *Fletcher v. Peck*, 6 Cranch 136, *Dartmouth College Case*, 4 Wheat. (Marshall, C. J.) 627 ; . 656, 658 ; *Story* 683-4, 687, 689.

Defendants are not bound to submit to a preliminary inquiry or forthwith return, or offer to return, the consideration void covenant. A complainant in equity seeking, not to be relieved from a covenant void at law, may be bound to offer to return the consideration ; but a complainant in equity to enforce a void covenant is in the same position in equity as he is at law ; the defendant can plead the illegality just as he could at law, and is bound to offer nothing. The law follows the law in such case, as is illustrated in the old cases, and many others.

The legislature is forbidden to do it. If the legislature cannot do it, neither can any of its agents. The complainants are bound to take notice of the want of power of the agent with whom they dealt. *Whitcomb v. United States*, 256-7. Though the state through its legislature, or a legislative agent, or any of its officers, accepted the consideration for the consideration of such a contract, the contract is void, and cannot be affirmed, for neither the legislature nor its agents originally have made it. *Maxwell v. Goetschius*, 11 Vr. The money received for the covenant (if any was received) was received by the trustees, as agents for the state, from the West Line grant was so received. All their money is so received. Whatever was received from the West Line grant was so received. All they have was so received, and for all of it they are answerable to the state only. If the agent is well known, and a public officer, there is no privity to third persons. *Colvin v. Holbrook*, 2 N. Y. 126 ; *Chitty on Agency* § 517 ; *Chitty on Cont.* 899, 900 ; *Jones v. Williams*, 8 Q. B. 134 ; *Stephens v. Badcock*, 3 Barn. & Ald. 354. The state cannot recover against a deputy sheriff who collected public revenue which he ought to have paid into the treasury. The action must be against sheriff. *Harlan v. Lumsden*, 1 Ky.) 87 ; *Owen v. Gatewood*, 4 Bibb 494 ; *Bank of the United States v. Bank of Washington*, 6 Pet. 19.

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But, again, there is no equity in this suit—for a return of the consideration of the covenant, though void—and though they offered to rescind the whole bargain and reconvey the whole property—seven hundred acres—conveyed by the deed of 1874, in which the covenant is contained. Even if the complainants were the mortgagors in the mortgage of the West Line company, and were parties to the foreclosure, and the money paid for the void covenant got into their hands and might be got back out of the school fund by an action, it could not be set off or affect the old mortgage or delay its collection. *White v. Williams*, 2 Gr. Ch. 376, and the numerous cases there cited; *Dolman v. Cook*, 1 McCart. 57, 68; *Dudley v. Bergen*, 8 C. E. Gr. 401. There has been no breach of the covenant, whether it be valid or void; and none threatened, and there will be none if the sale takes place; and no injury can therefore take place by not returning the money. Unless a sale will be a breach of the covenant, the complainants cannot restrain it, no matter how much money the complainants paid to get the covenant.

The whole argument on this point and the alleged equity for delay by reason of the covenant, rests on the premise that the state had not the power and right to make the West Line grant, because the complainants were the owners of the ripa and had the property rights of access and adjacency, and were, at least, entitled to pre-emption. The West Line grant is not only a grant; it is a law, and repeals the statute of 1869, *pro tanto*. *Schulenberg v. Harriman*, 21 Wall. 62; *United States v. Repentigny*, 5 Wall. 211, 218. The act of 1869 did not bind the state itself to give a pre-emption. The state is never bound by its own laws unless the intention is plain and clear. *Trustees v. Trenton*, 3 Stew. Eq. 683; *United States v. Repentigny*, 5 Wall. 211, 267, 268; *Schulenberg v. Harriman*, 21 Wall. 62, 63.

VI. True construction of the covenant is not that the trustees have no right to sell until it is determined whether West Line title is valid, or until the West Line title is established as valid against complainants' title. If the preliminary injunction is refused, their rights will stand just as good after it as before.

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pendens is all they want. A preliminary injunction has been refused in a like case to stay a sale. *Osborn v. Taylor*, 5 *ge* 515.

II. The *locus in quo*. [Explanation of maps and location of premises ; also, various motions and legal proceedings relating to this and other causes involving the same premises].

III. The complainants are not in peaceable possession, and have not had peaceable possession, nor is their title equitable.

The peaceable possession is certainly a requisite to the maintaining of a bill to remove a cloud from a title. *Lembeck v. New York City*, 4 *Stew. Eq.* 264, 272, 273. Though there is possession, if it be fraudulently taken or continued, it will not answer the purpose. *Huntington v. Allen*, 44 *Miss.* 662 ; *Collins v. Thomas*, 1 *F. & F.* 416. If a tenant of another hands over his possession, and party filing bill takes it, he will not be allowed to make such possession a ground for the bill, though fraud can be proved. It is enough that the complainant so gets possession. *Harden v. Jones*, 86 *Ill.* 313 ; *Comstock v. Henneberry*, *Ill.* 212. In such cases the strait is of his own making. In such cases equity don't interfere. *Doughty v. Doughty*, 2 *Stock.* 41. Possession is not peaceable within act on clouds on title equity jurisdiction on clouds, if it even be merely inequitable. *McCis's Maxims* 6 ; 1 *Wait's Act. and Def.* 728 ; 10 *Ves.* 306 ; *Ed v. Thompson*, 13 *Sm. & M.* 344. Possession obtained against the will of owner is a forcible possession, and not such possession as is required to maintain bill to remove cloud. *Croff v. Winger*, 18 *Ill.* 250. If it is obtained in an illegal or unlawful manner, bill will not lie. *Tichnor v. Knapp*, 6 *Oreg.* 205. If the facts cast a strong suspicion on the title, out of the way of which another title is asked to be moved, the other title will be removed. *Huntington v. Allen*, 44 *Miss.* 667. If the complainant has only a quit-claim deed, he will not be relieved. If suspicious. *Kerr v. Freeman*, 33 *Miss.* 269. The title to be removed must be colorable at most ; but must be colorable by law. The other title must be clear. *Orton v. Smith*, 18 *How.* 1. There must be more than a claim. There must be title,

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and set out in pleadings. The statute cannot be construed literally. *Starb v. Starr*, 6 Wall. 419. A party claiming a right means a party having a right. *Bridge Proprietors v. Hoboken*, 2 Beas. 99, 100, 101, 539, 541, 554, 555. A party getting into possession after warning not to do so, must leave to the party entitled, the time when the question is to be settled. Disregard of notice is fraud. *Wade on Notice* §§ 9, 42, 50, 82, 90, 93.

Assertion of title by the legislature of this state is, when it makes a grant, much more than by a private individual. It is equal to entry. It is equal to a judgment of forfeiture. *Schulenberg v. Harriman*, 21 Wall. 63, 64; *United States v. Repentigny*, 5 Wall. 211, 268. At common law the king was always in possession. *Dyer* 139 b; 16 Vir. Abr. 536, 564, 566; *Brookes's Abr. tit. Prerogative pl. 55*. State has many prerogatives—as to convey though not in possession, when by a statute it is provided that all such conveyances are void. *Brady v. Begum*, 36 Barb. 533. By all the authorities, a decretal order got by covenantor, restraining a covenantee from exercising his right to land conveyed, is a disturbance, and makes the possession unpeaceable and a violation of the covenant for peaceable and quiet enjoyment. *Hunt v. Danvers*, T. Raym. 370; 2 Sug. on Vend. 746; *Dart on Vend.* 367. This decretal order, and the agreement that the injunction should stand, make a much stronger case of disturbance of the possession than a disturbance by the mere commencement of a suit, which is held to be enough to make a possession unpeaceable and unquiet. *Stewart v. West*, 2 Harr. 338, 539. It is in numerous cases held to the effect—but nowhere stated so sharply as in *Gray v. Hastings*, 193, 39 Cal. 367—that “it is enough that the true owner asserts his title and demands the possession,” to constitute a breach of the covenant for quiet and peaceable enjoyment.

The cases deciding what is a violation of a covenant for quiet enjoyment and peaceable possession, may show what is peaceable possession. 2 Sug. on Vend. 746; *Platt on Cor.* 322; *Powell v. May*, 9 C. E. Gr. 179; *Hunt v. Danvers*, T. Raym. 371; *Dart on Vend.* 367; *Rawle on Cor.* 145; *Selby v. Chute*, 1 Bro. C. C. 23; *Dietrichsen v. Colburn*, 2 Phill. 52; *Drew. on Juris.* 273;

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ances's Case, 8 Co. 91 b; 2 Steph. Nisi Prius 1083; *Andrews Paradin*, 8 Mod. 318; 4 Rob. Prac. 32.

IX. They have not such title as entitles them to injunction against a *bona fide* claimant, for any purpose—much less to compel him to stay a sale under a decree by which they will not be bound. To get an injunction even to stay waste, the title must be sworn to, and sworn to not merely on information and belief. *Drew. on Inj.* 187. There must be positive evidence of title. *Davis v. Leo*, 6 Ves. 784, 787. There must be positive evidence of title—information and belief not enough. *High v. Inj.* §§ 984, 985, 986, 987; *Kerr on Inj.* 237. Courts don't interfere by injunction if complainant's title is doubtful. *Field v. Jackson*, Dick. 599. Nor if the law is doubtful. 5 C. E. Gr. 135-138, 455.

It is a bill in form to remove a cloud, but in fact and substance a bill to try not even the state's title, but the state's power and right to convey to the West Line company. This is the real object. A bill to try that question might lie, if there had not been extraordinary laches, and if it were alleged that there was no suit pending and that claimants or state would not bring an action in which question could be tried, and it were not a mere question of law already settled against complainants. *Lodges v. Driggs*, 21 Vt. 282-3.

Where a party does, as complainants did, get an injunction in 1876, and never renew it, as was necessary—so that, after delaying the trustees for two years and eleven months, it was declared void, by laches; and they admit the court never had a right to grant it—the court will hold that the complainant does not consider the case to be urgent. Injunctions do not go before decree, except on the ground that to wait for the decree would be productive of great and unknown mischief to the complainants. Much supineness prevents the court interfering until final hearing. *Peckford v. Grand Junction*, 3 Railw. Cas. 558, 559; *Doughty v. Doughty*, 2 Stock. 350, 351. The title of the state is notorious." *Cooper v. Bloodgood*, 5 Stew. Eq. 212.

These circumstances of a desperate claim and extraordinary

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laches are as much against an injunction as the fact would be if the defendants were in adverse possession or made a fair show of title, which the court would not enter into, as in *Shreve v. Black*, 3 Gr. Ch. 185, 186. In *Shields v. Arndt*, 3 Gr. Ch. 234, it is held that in cases of doubt as to the title, the court will not interfere by injunction. So held in *Outcalt v. Disborough*, 2 Gr. Ch. 217. He must show a sufficient title. *IB.*; *Kerlin v. West*, 3 Gr. Ch. 453. Title must be shown by the bill. *McGee v. Smith*, 1 C. E. Gr. 463; *Morris Canal v. Central R. R. Co.*, 1 C. E. Gr. 425, 438. The court will not go out of the record. Though an act is public unless the special clause is stated in the bill, the court will not permit the case to be put on it. *Bailey v. Birkenhead*, 12 Ves. 433; 6 Railw. Cas. 526; 14 Jur. 119; *Godef. & S. on Railroads*, 2, 314. It will be seen that the court never interferes to remove a cloud unless it is apparently a good title. *Gamble v. Loop*, 14 Wis. 465. The plaintiff must clearly show the validity of his title. *Watts v. Lindsay*, 7 Wheat. 242. When complainant's title is doubtful, there is no right to remove a cloud. 1 *Wait's Act. and Def.* 666. See, generally, *Stew. Dig. tit. Injunctions—Granting* 619–627. The pretence that they could purchase riparian rights because they were a corporation, and acquire the riparian right—though not authorized to do so—is answered by the cases of *Chamberlain v. Chamberlain*, 33 N. Y. 439; *Potter on Corp.* p. 47 § 28. If they do purchase, no direct proceeding is necessary to get back for the state what they thus attempt to acquire. If the state grants its rights to anybody, it is equal to entry for forfeiture. *Schulenberg v. Harriman*, 21 Wall. 62, 63. It is a good ground to deny or dissolve injunction, that the complainants have got a stay order or an injunction not presenting the whole case. *High on Inj.* § 11; *Canton Co. v. Northern R. R. Co.*, 21 Md. 383; *Reddan v. Bryan*, 14 Md. 444; *Drew. on Inj.*

X. A suit is pending to test and enforce the title, which is claimed to be a cloud. It is necessary to allege, in a bill to remove a cloud, that no suit is pending. See the authorities in first part of eighth point, also *McClave v. Newark*, 4 *Stew. Eq.*

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Any new matter must be put in issue by the answer, and is no other way of doing it. The answer and the replica-put in issue all the facts stated in the answer. 1 *Dan. Ch. 2d Am. ed.*) 462; *Atwood v. —*, 1 *Russ.* 355.

I. The defendants may impeach the complainants' title, though they should have the nominal title to the *ripa*.

The truth is, the doctrine that no one can impeach a corporation's title for want of power to take a conveyance, is and always has been, from the time they bought out the dock company, in fact, the sole reliance of the complainants to hold on to what they should seize. The question really is not whether there is the corporate power, but what is the boundary of the alleged grant by the state; and to settle that, the question of power must and should be settled. The state may, at any time, without *quo warranto*, by any indication of its intention, make a grant of lands which have become forfeited. It is not necessary to have any judicial proceeding to settle this. If the state asserts its right, it is enough. *Schulenberger v. Harriman*, 21 *Wall.* 63, 64; *United States v. Repentigny*, 5 *Wall.* 211, 218. See *State v. Newark*, 1 *N. J. Ch.* 317, that validity of a purchase by a corporation depends on its power.

For Thomas N. McCarter, for the executors of Asa Packer.

The question involved in the present motion is, whether the Chancellor should have granted an injunction to restrain the trustees for the support of public schools from proceeding to sell the premises at Jersey City known as the West Line grant, or whether, on the other hand, he did right to discharge the rule to show cause, and vacate the stay, which, pending the rule, prevented such sale.

The trustees have a mortgage given to them by the New Jersey West Line Railroad Company, in securing a portion of the purchase-money for a tract of about fifty-eight acres, granted to the New Jersey West Line Railroad Company by the legislature of this state, by act of the legislature approved February 14th, 1872.

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The mortgage has been foreclosed in the court of chancery, a decree for the sale of the premises has been entered, and an execution is in the hands of the sheriff of Hudson county.

The appellants, who were complainants below, seek to have a sale under that execution enjoined, on the ground that they have title to the premises covered by the mortgage and *feri facias*, by grants from the state, prior to the West Line grant, and by other title paramount to that, and that a sale under this mortgage will cast a cloud on their title, and therefore it should be enjoined.

The chancellor denied the injunction for reasons stated in his opinion, reported in *5 Stew. Eq. 428*. His decision was based mainly on the ground that the trustees for the support of public schools were mere agents of the state, and that the suit was virtually against the state, and, as such, could not be maintained.

It is manifest, however, that the hearing of this appeal necessarily involves a discussion of the whole merits of the controversy, and on this argument respondents rely, not alone upon the reasons assigned by the chancellor, sufficient and satisfactory as they are, but also on many other cogent reasons which he did not deem it necessary to consider.

I. On well-settled principles regulating the practice of courts of equity in granting injunctions (without regard to the merits of the controversy), the complainants are not entitled to an injunction to stay the proposed sale.

The object of the bill is declared to be to have the foreclosure sale perpetually enjoined, and to have the West Line grant declared invalid and void, and to restrain any one claiming thereunder from setting up such title against complainants, and from disturbing complainants in their possession, and to remove the cloud the grant casts on the title of complainants.

This case comes, then, directly within the operation of that long-established and well-settled rule of equity law as to injunctions, that a preliminary injunction will not be granted except to prevent an irreparable injury. This rule has been so recently vindicated and re-affirmed in the court of errors in this state, in the case of *Citizens Coach Co. v. Camden Horse R. R. Co.*, ⁸

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Stew. Eq. 299, that no additional citation of authorities can be requisite for its establishment. *Wilkins v. Kirkbride*, 12 C. E. r. 93

It is so familiar and elementary that the title acquired under foreclosure sale creates no new right—it only extinguishes an equity of redemption, and remits the purchaser to precisely such title as the mortgagor had when the mortgage was given—that

authority is necessary for its establishment. The purchaser of such a sale acquiring only what was conveyed by the mortgage; no more, no less. If any authorities are needed for such proposition, the following abundantly sustain it: *Thompson v. Ryd*, 2 Zab. 549; *S. C.*, 1 Zab. 64; *Van Wagenen v. Brown*, 2utch. 196; *Duncan v. Smith*, 2 Vr. 325; *Mulford v. Peterson*, Vr. 131; *Chiswell v. Morris*, 1 McCart. 102; *Eldridge v. Eldridge*, 1 McCart. 195; *Den v. Van Ness*, 5 Hal. 102; *Woodall v. Reid*, 1 Harr. 128; *Stow v. Tift*, 15 Johns. 460; *Cowles Cheever*, 1 Cow. 479; *Holcomb v. Holcomb*, 2 Barb. 23; *Frost Kern*, 30 N. Y. 467; *Holbrook v. Finney*, 4 Mass. 57; *Eyster Gaff*, 1 Otto 521.

In fact, the question now being discussed may be said to be *res adjudicata* on that very point. In the case of *Trustees for the Support of Public Schools v. N. J. West Line R. R. Co.*, 3 *Stew. Eq.* 494, the present complainants, represented by Mr. Lathrop, receiver, applied to the court of chancery to have a sale heretofore made, under this same execution, set aside, and a further sale enjoined until the dispute about the title could be settled. The court held the sale irregular, and set it aside, but it expressly decided that so far as Mr. Lathrop's adverse claim of title was concerned, that gave him no standing to attack the sale. The judgment of the chancellor in that case was affirmed in this court, without any expression of dissent from the views thus expressed by him. 4 *Stew. Eq.* 295. I look upon the judgment of this court in that case as conclusive against Mr. Lathrop, in this or any other cause where the same point is in controversy, and especially as that petition prayed for a stay of the sale on the same ground as the present bill, and that was denied. *Gregory v. Molesworth*, 3 Atk. 626. In fact, the complainants' bill

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prays for a decree against any purchaser at any future sale, which undoubtedly was inserted by the experienced pleader who drew this bill, in view of the well-settled and almost elementary principle, that a purchaser at such sale pending this suit will be bound by whatever decree is made in the cause. *Haughwout v. Murphy*, 1 C. E. Gr. 544, and the authorities cited in that opinion. *Eyster v. Gaff*, 1 Otto 521; *Osborn v. Taylor*, 5 Paige 576. The case of *Holmes v. Chester*, 11 C. E. Gr. 79, is not in conflict with this view. There the cloud would have been greatly increased by a sale, which was not on a mortgage; for that reason, the chancellor allowed an injunction. The question there was not whether an injunction was proper, but whether the bill could be maintained at all. It was a demurrer, and all that was decided was that the bill was well filed.

Another equally well settled rule in regard to granting or withholding an injunction, is: An injunction ought not to be granted when the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as to properly deprive the wrong-doer of the benefit of any consideration as to its injurious consequences. *Morris and Essex R. R. Co. v. Pruden*, 5 C. E. Gr. 520.

There is another consideration which, by well-settled rules, deprives these complainants of all right to an injunction. It was decided in this court, in *Morris Canal Co. v. Central R. R. Co.*, 1 C. E. Gr. 419, that to entitle a party to an injunction, his title to the property and rights claimed by him, and for the protection of which he asks the interposition of this court, must appear in a clear and satisfactory manner. The whole case is important, not only on this question of injunction, but on other questions that are to be discussed in the case. *Stevens v. Newark and Paterson R. R. Co.*, 5 C. E. Gr. 126. See *Orton v. Smith*, 18 How. 263-5.

II. The second point of objection to the allowance of this injunction is that complainants are estopped from asking for this injunction by the conduct of the receiver, Lathrop, who now

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represents all the complainants in the suit, and by their laches and delay in prosecuting their claim. This estoppel as to the conduct of the receiver grows out of the fact before adverted to, that in order to obtain from this court an order setting aside the sale of these premises to Chamberlain, the receiver of the Central Railroad Company, Mr. Lathrop, with Mr. John Kean, vice-president of said company, in compliance with the terms of said order, which was granted in part on Lathrop's application, made in the same right and interest as that which he represents here, entered into a bond in the penalty of \$200,000, conditioned that on a resale the property shall bring the amount then due on the *fieri facias*, debt, interest and costs, with the lawful expenses of both sales. I contend that such a bond, with such a condition, amounts to a covenant that the obligor will not prevent a sale; and if a sale is defeated by his act, it is a breach of the condition of his bond. *Vinyor's Case*, 8 Coke 81; *Platt on Cov.*, 55-58 (3 Law Lib. 25); *Russell on Arb.* 57, 101, 149; *Billings on Awards* 263, 264; *Watson on Arb.* 22, 23 (11 Law Lib. 12); *Id.* 214 (11 Law Lib. 11); *King v. Joseph*, 5 Taunt. 452; 3 Add. on Cont. p. 459 § 400; 2 Wait's Act. and Def. tit. Covenant 405, and cases cited; *Warburton v. Storr*, 4 B. & C. 103, and cases cited; *Pope v. Lord Duncamon*, 9 Sim. 177; *Morse v. Merest*, 6 Madd. 26; *Harcourt v. Ramsbottom*, 1 Jac. & W. 485; *Heard v. Bowers*, 23 Pick. 455. In *Rex v. Wheeler*, 3 Burr. 1256, an attachment was issued against a suitor for contempt, who, having agreed to a reference, filed a bill in equity to avoid the award. See, also, *Hilton v. Hopwood*, 1 Marsh. 66.

Ordinarily, as the authorities show, if the obligor defeats the condition of his bond, it destroys the condition of the bond and makes it single; but this is a bond to the court. It is a file of this court, and cannot be prosecuted, except by order of the court; and the complainants know very well that if they can make this court the instrument of defeating the sale, they need not apprehend a prosecution on the bond. See, in support of the principle above contended for, *Bond v. Hopkins*, 1 Sch. & Lef. 434; *Doughty v. Doughty*, 2 Stock. 347; *West Jersey R. R. Co.*

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v. Thomas, 8 C. E. Gr. 440 ; *Puttney v. Warren*, 6 Ves. 73 ; 2 *Story's Eq. Jur.* § 1316 a &c.

Again, Mr. Lathrop is estopped from obtaining an injunction to delay this sale by his laches, and that of the company he represents. It is a well-settled rule of this court, that if a party desires the extraordinary aid of this court, he must come promptly. If complainants have slept over their rights, have seen defendants making contracts and expending large sums of money, and taken no steps to restrain them, it is fatal to the application. *Scudder v. Trenton Delaware Falls Co.*, Sax. 695 ; *Trustees of Newark Co. v. Gilbert*, 1 Beas. 78 ; *Carlisle v. Cooper*, 3 C. E. Gr. 241-247 ; *Scanlan v. Howe & Curtis*, 9 C. E. Gr. 273 ; *Easton v. N. Y. & L. B. R. R. Co.*, 9 C. E. Gr. 50 ; *Liebstein v. Newark*, 9 C. E. Gr. 200 ; *Lewis v. Elizabeth*, 10 C. E. Gr. 298 ; *Kerr on Inj.* p. 206 ¶¶ 13, 14 ; *Id.* p. 299 ¶ 15 ; *Id.* p. 349 ¶ 30 ; *Id.* p. 406 ¶ 13. This delay could not have been from ignorance, for they aver in their bill that soon after the grant was passed, they decided to take legal measures to protect their rights. They rested, however, nearly four years, within which time the mortgage had been foreclosed at great expense, and the property advertised, and about \$500 more incurred by the trustees of the school fund in costs ; and then, instead of coming to this court, they went to the United States court, which had no jurisdiction to grant an injunction, and which even had no jurisdiction of the parties, except by a colorable and fictitious deed, such as the supreme court, in *Barney v. Baltimore City*, 6 Wall. 287, 288, characterized as an imposition on the court, and as having no other object than to hinder the trustees in the collection of their debt, obtained an injunction which stayed the sale illegally for nearly three years, in plain and direct violation of the act of congress. And when they were finally driven from that refuge, they set aside the sale that was made, and now come and ask for an injunction, and aver their intention to keep this sale delayed, if possible, until the end of a suit in the United States supreme court, thus causing five years more of delay.

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[II. An examination of complainants' bill shows such radical defects as to the parties, and such an absence of equitable right of relief, and such an imperfect title in complainants, that it is quite plain that complainants cannot ultimately succeed in their cause; and for that reason no injunction should be granted, and the bill should be dismissed.

First, as to the objection to the bill as to the parties. The bill is fatally defective in that respect, for three reasons:

a) John Taylor Johnston, who is joined as a defendant, could have been a complainant.

b) John Van Horne has no standing, and if he has, he cannot be properly joined in this suit as a complainant.

c) The Central Railroad Company and its receiver have no title which gives them the right to bring such a bill or join as complainants in it.

(a) As to John Taylor Johnston. He is made a defendant, when he should be a complainant in the cause. Johnston is trustee, and the dock company is the *cestui que trust*. In such cases, the rule is that they shall be joined as complainants. See *Wright on Trusts* p. 802 § 886; *Reed v. Sparks*, 1 Moll. 10; *Hughes v. Key*, 20 Beav. 395; *Hosking v. Nichols*, 1 Y. & Coll. 10; *Mitf. & T. Plead. and Prac.* 17, citing 2 Bland 264, 292. The following cases in New Jersey recognize the principle: *Ann v. Seymour*, 3 Stock. 220; *Nichols v. Williams*, 7 C. E. R. 63; *Stillwell v. McNeely*, 1 C. E. Gr. 305; *Elmer v. Loper*, 1 C. E. Gr. 480.

(b) John C. Van Horne is improperly joined as a complainant in this suit. As the title now stands, John C. Van Horne has no interest whatever in the largest portion of the West Line tract. Nor has the dock company in the residue. Can two several owners of contiguous tracts unite in such a bill to remove a cloud on their titles, merely because when their several holdings were once owned by one owner, the adverse title clouded the whole? There is no allegation that these parties have any joint interest, nor is there the slightest allegation that their joinder is required to prevent multiplicity of suits. Here is a plain misjoinder. *Story's Eq. Pl.* 289; 1 Dan. 350; *Mar-*

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selis v. Morris Canal Co., Sax. 31-37. An injunction was denied in this case, for this reason. *Hinchman v. Paterson H. R. R. Co.*, 2 C. E. Gr. 75. In this case, the chancellor cites with approbation the case of *Hudson v. Madison*, 12 Sim. 416; *M. & E. R. R. Co. v. Pruden*, 5 C. E. Gr. 530; *Hendrickson v. Wallace*, 4 Stew. Eq. 604. If that be law, any outsider may buy in an outstanding claim to mortgaged premises, and without possession file a bill and enjoin the collection of a mortgage, on the ground that a sale would cloud his title. See *Orton v. Smith*, 18 How. 263.

(c.) Neither the Central Railroad Company nor its receiver, have any such title as will enable them to maintain such a suit as this, or to join as complainants therein. It appears that the American Dock Company conveyed about half the premises in dispute to John Taylor Johnston, together with the right to use the basin constituting the other half. From this it is manifest that the whole legal and equitable title to the *locus in quo* is out of the Central Railroad Company.

The only grounds alleged in the bill as reasons for the Central Railroad Company's claim, are:

First. That that company owns almost all the capital stock of the dock company, and as guarantor of \$3,000,000 bonds of the dock company, which are secured by mortgage to the trustees, covering the West Line grant; and

Second. That the Central Railroad Company took a grant from the state to the property of the dock company, surrounding the *locus*, with a covenant, that in case the state had not the right and power to vest the title in the West Line company, it would, without further consideration, except \$1, release to the Central Railroad Company all its right, title and interest in the West Line grant. As to the first of these grounds: The fact that the Central Railroad Company is a stockholder, large or small, in the corporation which claims title to the lands in dispute, does not make it a necessary or proper party to a bill filed by such corporation to quiet its title to the disputed land. It is a well-settled rule that a suit to quiet title, and remove a cloud, can only be brought by the parties in possession. *Shapley* v.

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Angely, 1 Woodb. & M. 213; *Orton v. Smith*, 18 How. 263; *Woonshire v. Newenham*, 2 Sch. & Lef. 199, 208. Such, also, is the statute in regard to titles. In fact the whole argument in the case of *Lembeck v. Jersey City* above cited, shows that such suits are only designed to relieve parties in possession.

But secondly—The so-called grant from the state gives the Central Railroad Company no standing in this court. The grant of itself excludes or excepts the land covered by the West Line grant. The covenant is not for title, but for a release of the state's rights, free of encumbrances. Was it ever heard before that a party having no title or possession, but a mere covenant for a release on the happening of an uncertain and future contingency, can entertain a bill of peace to quiet title? Now if that covenant was valid and binding it only becomes operative when it shall have been determined that the state had no right and power to vest the title in the West Line Railroad Company; but that is no longer an open question in New Jersey. It has been settled that the state has the right and power by the cases heretofore referred to, notably the case of *Stevens v. Newark and Paterson Railroad Co.*, 5 Vr. 532; *Pennsylvania Railroad Co. v. New York and Long Branch Railroad Co.*, 8 C. E. R. 157.

III. Complainant has not by his bill shown any right to equitable relief.

First. As to the point that a bill of this kind cannot be entertained to draw into a court of equity the discussion of a question of title to land, see Mr. Stockton's brief, in which the question is so fully discussed that the argument need not be repeated here. I will insist, notwithstanding the chancellor's opinion to the contrary, that this bill cannot be sustained by invoking to its aid the provisions of the act "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," for various reasons.

First, the bill is not framed so as to bring the case within the provisions of that act. *Rev. p. 1189.*

Again. The act in question only relates to persons who are peaceable possession of lands in this state, and to cases where

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no suit is pending. Now it is admitted in this bill that, in January, 1870, the attorney-general of this state instituted a suit to restrain the Central Railroad Company from taking possession of this tract, and that such suit is still pending. This allegation, so delicately made, is more fully explained by the answer, which shows not only that such a suit was commenced, but that complainants were actually enjoined from taking possession, and that all the possession they have acquired since then has been in violation of the injunction of this court. Such a possession is in no sense peaceable. A possession thus obtained is not such peaceable possession as was held in *Powell v. Mayo*, 9 C. E. Gr. 178, but when it is disputed and contentious it is not peaceable in a legal sense. *Lehigh Valley R. R. Co. v. Mo-Farlan*, 4 Stew. Eq. 184.

Second. There is a radical defect in this suit, in that it is in effect a suit against the state of New Jersey, and its object is to restrain officers of the state, in the discharge of the duties of their office, in the collection of the revenues of the state. The general rule is, that while equity may in some cases enjoin the collection of a tax, it will not be done except in case of irreparable injury when there is no adequate relief at law.

To justify the court in granting an injunction in such a case, the bill must contain some particular ground of equitable jurisdiction. *Hoagland v. Delaware Twp.*, 2 C. E. Gr. 106.

The money here being collected is the principal and interest of a permanent fund irrevocably devoted, both by the constitution and by statute, to a great public use; to interfere with its administration and collection would cause more difficulty and embarrassment than to stay the collection of the ordinary revenues of the state.

In *Calvert on Parties to Suits in Equity* p. 252, it is said the principle to be extracted from the several cases in respect of suits for the payment of money, is that which was relied upon in *Priddy v. Rose*. When the public officer owes a duty to a private person, as when the crown has ordered the money to be paid, then the officer is responsible to that person for an account of it. But if the officer is merely appointed to serve the crown

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in collecting money, making schemes of distribution, reporting or advising, then the private individual, on whatever ground his claim may be founded, can have no suit against the officer; he must apply to the crown by petition of right.

It seems clear that an officer of the crown could not be made a party to a suit of which the object was to restrain him from discharging a public duty. *17 Law Lib. 146.*

The following case cited by counsel in *Ellis v. Earl Grey*, 6 Sim. 220 is in point.

In *Oldham v. Lords of the Treasury*, a case in the exchequer, but which is not reported, the king, being entitled to receive a certain sum out of the consolidated fund in respect of the civil list, granted a pension to a party who assigned it. The pension was afterwards revoked, and a new one granted in lieu of it, and the assignee filed a bill against the lords of the treasury to compel them to pay the new pension to him. Graham, Baron, who delivered the judgment of the court, said: "This bill proceeds on the ground of the fundamental jurisdiction of the court over the consolidated fund, and the purpose of the bill is to call on the court to dispose of the money which has been placed by parliament at the disposal of the king himself. The jurisdiction of the court of exchequer extends only to the reaching of the moneys which come into the treasury while they are *in transitu*, but after parliament has disposed of them and they have reached their destination, the jurisdiction of the barons ceases; and here, the king alone can order the payment of the money. The money is granted to the king, his successors and assigns, and the king himself must be sued if this money is to be got at."

The legal constitution of this board of trustees is such that no suit can be maintained against them.

This consideration makes it very clear that the state is a necessary party to this suit, and as the state cannot be sued, it follows that the court has no jurisdiction. *Ex parte Madrazzo*, 7 Pet. 627.

It cannot be answered that when a state commits its property to agents who invest it and take securities such as are usual

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between individuals, that the state thereby subjects itself and its agents to the same rules which govern private individuals in like cases. *State, Morris Canal and Banking Co., v. Haight*, 7 Vt. 471; *Transportation Co. v. Chicago*, 9 Otto 641.

Third. The complainants show no such title in the disputed territory as entitles them to an injunction to quiet their possession without a trial at law.

The proposition that the state is the owner of the land under water, below high-water mark, in its navigable waters, is too well established at this day, so far as New Jersey is concerned, to be capable of dispute, or to require any authority to sustain it. *Stevens v. Paterson and N. R. R. Co.*, 5 Vr. 532; *Pennsylvania R. R. Co. v. N. Y. & L. B. R. R. Co.*, 8 C. E. Gr. 157.

So, too, as to the allegation that the title was only to vest on payment of the price fixed by the commissioners, and that \$123,000, the amount due on the mortgage, has never been paid. Were this allegation not formally set up in the bill, I should not consider it worthy of a serious answer. A very few words will serve to dispose of it. Payment has, in law and in fact, been made, so that the state is estopped to deny it. The deed from the proper officers acknowledged the payment. The parties who were to receive it have accepted and treated this mortgage as part payment. They have received interest on it, and have foreclosed it, obtained a decree on it, and have, in every possible way, recognized and affirmed its validity. Could the state now be heard to defeat that grant because of non-payment? and, if not, can a stranger? *Schulenberg v. Harriman*, 21 Wall. 62; *Lessieur v. Price*, 12 How. 59, 76; *Rutherford v. Green*, 3 Wheat. 196.

Upon what, then, does the complainants' claim of title rest?

First in the order stated in the bill, comes the claim of title in the Central Railroad Company. It will be observed that though the original title of the state is not disputed, so that the state can be the only source from which the title to these lands can be derived (except the riparian right hereafter referred to), no direct grant or other paper title from the state is set up or

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ended. The Central company seek to build up their title foundations which, concisely stated, are as follows:

1st. The act of the legislature of New Jersey, passed February 23d, 1860, authorized the Central Railroad Company, whose terminus was then at Elizabethport, to extend their road to "some point or points on New York bay, in the county of Hudson at the mouth of Jersey City, and for that purpose, in its construction and completion, maintenance, use and enjoyment, all and every provision of the act entitled 'An act to incorporate the Jersey and Easton Railroad Company,' and of the several provisions thereto, shall extend and be applicable to the railroad now authorized to be constructed, in every respect as if the same had been originally authorized under the said act to which this is a supplement."

The fourth section of the act enacts "that nothing herein contained shall be construed to prejudice the claims of riparian owners."

From this little provision it is argued that the legislature thereby recognize the claims of riparian owners, and that, by necessary implication, the company was invested with the requisite power to acquire or extinguish so much of these rights and claims as would stand in the way of the extension of their road.

Stopping for a moment to consider this argument, if we admit the so-called implication claimed to arise out of that clause of the act which saves the claims of riparian owners from being prejudiced by the act, we can only admit an implication of so much as was necessary for the company to do to prevent the riparian owner from hindering the construction of the work; and as that could be as effectually accomplished by the extinguishment of the riparian owner's claims as it could be by the acquisition of them, the necessary implication would be satisfied by such extinguishment, and could, of course, extend no further.

A claim of this character is best answered by quotations from similar cases, as to what rights a private corporation can acquire in implication as against the public.

THE CASE AND THE POINTS IN DISPUTE.

The whole argument is that because the title of the bill is in the fourth section, passed that nothing beyond that title is construed to regulate the claims of foreign land owners. It therefore is a necessary indication, understood in company with the claims of such owners, that the bill is confined to the title to the lands under water in the New York waters. *Pennsylvania R. R. v. National R. R. Co.*, 100 U. S. 157; *Devereux Bay Case*, 100 U. S. 173; *Porter v. Commonwealth and Devereux Bay Case*, 100 U. S. 173; *Porter v. Commonwealth and Devereux Bay Case*, 100 U. S. 173; *Porter v. Commonwealth and Devereux Bay Case*, 100 U. S. 173; *Porter v. Commonwealth and Devereux Bay Case*, 100 U. S. 173.

The same things are meant to be secured by that part of the state constitution which contains Article IV., section 7, clause 1. "To avoid improper influences which may result from intermingling, no one and the same act, such things as have no proper relation to each other, every law shall embrace but one subject, and that shall be expressed in the title." Suppose it had been expressed in the title to this supplement that one of its powers was to take away, without compensation, the right of the state to six hundred acres of its most valuable possessions, how many legislative votes would it have received? It is common for complainants to contend, this bill does serve the double purpose of conferring power on the Central company to extend to the New York bay and also of giving to it the large tract of land now claimed by it, that very duplicity of object would render it unconstitutional under the clause just quoted.

This doctrine, so forcibly restated by Vice-Chancellor David, was noticed and applied on behalf of the present complainants, in the case of the *Morris Canal and Banking Co. v. Central R. R. Co.* reported in 1 C. E. Gr. 229; see particularly pages 132 to 136.

It is not my purpose to discuss elaborately or in detail the several propositions which go to make up this remarkable claim of title. I shall content myself with a few general propositions which seem to me to be well established, and which effectually destroy any such pretended title.

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First. The Central Railroad Company had no right, by its charter, to become riparian owners of the strip around the cove for which it took the deeds as above mentioned.

Second. If it could lawfully become the owner of the *ripa*, there was nothing, either in the fact of such ownership or in the company's charter, which extinguished the title of the state to the lands under water in front of the *ripa* or granted such lands to the company.

Third. As lawful riparian owners, the only rights which were ever recognized were repealed and abolished by the riparian act of 1869.

Fourth. If they had not been repealed, they were never exercised before the state made the grant in 1872, and that grant to another worked a revocation of any pre-existing and not exercised license. The only rights ever recognized as belonging to a riparian owner under the revocable license, were to fill in and reclaim the lands under water in front of and adjacent to the *ripa*, so that such reclamations and fillings-in became accessible and part of the *ripa*, making a new high-water mark. The ownership of the *ripa* never authorized the erection of cribs, bulkheads or other structures on lands of the state in front of, but disconnected with, the *ripa*. *State, Morris Canal Co., pros., v. Haight*, 7 Vr. 477.

Fifth. By the true and proper construction of the charter of the American Dock and Improvement Company, the operations of that company and its territorial rights are limited to lands south of the track of the Central Railroad, and said company had no right to acquire land or exercise its franchises within the territory in dispute, which is wholly north of the Central company's tracks.

In addition to the considerations mentioned in the answer and Mr. Gilchrist's argument, I add the following :

(1.) A careful examination of the charter of the American Dock Company shows that it was the intention of the legislature to limit the grant therein contained, and that all parties, public and private, who at the time had to deal with the grant, so construed it.

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But (2) it is manifest that all the parties interested so construed and located the grant. Schedule No. 4, which was the commission to the gentlemen selected by the governor to make the measurement, directs them to measure the shore front embraced and contained in the act of incorporation, and then limit it by the boundaries above described.

The commissioners, in their report, adopted the same language. They annexed a map showing the location to be limited, as we claim it, and the American Dock and Improvement Company, by a formal document, under its corporate seal, ratified and approved of the proceedings of the commissioners. Here was not only cotemporaneous construction, but practical location, and such was also the opinion of the Hon. Amzi Dodd, who was called upon by the then governor to pass upon the form of a receipt for the money to be paid for the lands.

The following cases are authority that the acts of officers in construing a law under which they are required to act, although not conclusive, are of great weight: *Packard v. Richardson*, 17 Mass. 144; *Opinion of the Judges*, 3 Pick. 518; *Edwards v. Darty*, 12 Wheat. 210; *United States v. Dickerson*, 15 Pet. 161; *Greeley v. Thompson*, 10 How. 234; *Union Ins. Co. v. Hoge*, 21 How. 66.

Especially is such the rule when such construction has been accepted and acquiesced in by the party affected by it, as in this case. It then becomes practical location. *Opdyke v. Stevens*, 4 Dutch. 89; *Bigelow on Est.* 160-1.

Again, it comes within the rule that when a corporation has once exercised its corporate powers, they are exhausted. *Morris and Essex R. R. Co. v. Central R. R. Co. of N. J.*, 2 Vr. 205-208, and the cases there cited; *Childs v. Central R. R. Co. of N. J.*, 4 Vr. 327; *Walford on Railw.* 130-1.

Sixth. If we are right in the above propositions, then the fact that the complainant corporations have no power to acquire or hold the lands in question under their respective charters, is available to the defendants in this proceeding. The state, as a defendant in this case, may, by its agents, who are sued, defend its rights to its land by setting up a want of corporate power in

complainants, without being driven to a writ of *quo warranto* to set aside their claims.

The court of chancery in the case of the *Morris Canal Co. v. Central R. R. Co.*, denied an injunction on the ground of want of corporate power. See, also, *Morris and Essex Railroad Co. v. Newark*, 2 Stock. 364.

Seventh. The circumstances disclosed by the answer and affidavits, present a complete answer to so much of complainants' case as rests upon their alleged expenditure and the acquiescence of the state therein, and the case of *Cross v. Morristown*, 3 C. E. Gr. 305, in this court, strongly re-inforces the defendants' contention on those points.

Eighth. The so-called covenant of the riparian commissioners in their grant to the Central Railroad Company of 1874, cannot in any way impair the title of the state previously granted to the West Line company, nor give the Central company any standing to ask this injunction.

Finally, the receiver of the Central Railroad Company (whose suit this is), stands in no position to ask the relief prayed for in this bill. He was the chairman of the riparian commissioners at the time the boundaries and price of the West Line grant were fixed. From his long acquaintance with the subject matter of the suit, he and his associates in the commission could not have been ignorant of the facts and circumstances now set up to sustain the complainants' claim. These facts and circumstances were fully set forth in the answer of the Central company to the information filed by the attorney-general in 1870. Suppose Mr. Lathrop, instead of being receiver of the Central company, had himself purchased this disputed title from the Central and Dock companies, and filed a bill like this to enjoin the parties claiming under the grant from asserting their title, on the ground that his own previous grant was void, the answer, not only of a court of equity, but of any honest man, would be—

If your present claim is legal, why did you, with knowledge of these facts, exact from the West Line company \$125,000 for a title so worthless? Why delude the trustees of the school

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fund with an apparent mortgage of \$32,000, which you now say is nothing but waste paper? If your action then was in good faith, as no one doubts it was, is it consistent with good faith that you now shall impeach your own grant? If such would be the answer to Mr. Lathrop as an individual, it is equally effectual against his claim as receiver. This court exacts of its receivers no duties, the performance of which would subject them, as individuals, to a suspicion of bad faith.

The opinion of the court was delivered by

DEPUE, J.

By the ninth section of a supplement to the charter of the Passaic Valley and Peapack Railroad Company, passed February 29th, 1872, it was provided "that any lands of the state under tide water, or that have heretofore been under tide water, which shall happen to come within the location of the route or of the depots, stations, or other works of the company, or shall be needed therefor, shall be paid for by the company to the trustees of the school fund of this state; and the boundaries and price thereof shall be fixed by the riparian commissioners on application for that purpose to them, and shall be paid as aforesaid, prior to any filling or improvement thereon herein authorized; and on such payment thereof the title to such land shall vest in said company in fee simple, and a deed therefor may be made by said commissioners, governor and attorney-general, in the name and under the great seal of the state." *P. L. of 1872 p. 312.*

The corporate name of the company was, by the act of February 15th, 1870, changed to that of the "New Jersey West Line Railroad Company." *P. L. of 1870 p. 160.*

The New Jersey West Line Railroad Company having located its route, representing that certain lands, in part under tide water and in part theretofore under tide water, happened to come within the location of the route of the depots, stations, and other works of said company, and were needed therefor, applied for a grant of the same. On the 19th of March, 1872, the governor,

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general and riparian commissioners, pursuant to the action of the act of 1872 above mentioned, executed a deed to the New Jersey West Line Railroad Company for the lands, for the consideration of the sum of \$125,000. The lands granted were described as follows: "Commencing at a point on the east line of Warren street extended southerly at the northerly corner of the land granted to the Morris Canal and Banking Company, by an act of eighteen hundred and eighty-five, and from thence running westerly and parallel with Warren street, in Jersey City, twenty-eight hundred feet; thence southerly, at right angles with Grand street, five hundred feet; thence westerly and parallel with Grand street, to the original high-water mark on the west side of Communipaw bay or cove; thence returning to the place of beginning, and running easterly and parallel with Grand street, four hundred and forty feet. The southerly lines of the grants made to the Morris Canal and Banking Company, as aforesaid, to the centre line of Washington street extended southerly; thence southerly along the line of Washington street extended southerly, which is the westerly line of said grant to the Morris Canal and Banking Company, and at right angles with Grand street, five hundred and thirteen feet; thence westerly and parallel with Grand street, about thirty-six hundred and fifty feet, more or less, to a point in line with the centre line of Jersey avenue, in Jersey City, if the same were extended southerly to said point; thence southwesterly, in line with the said centre line of Jersey avenue, one hundred and sixty-five feet; thence westerly and parallel with Grand street, in Jersey City, about five hundred feet more or less, to the original high-water mark on the west side of Communipaw bay or cove; thence northeasterly along the original high-water mark at Communipaw bay or cove, to the mouth of Mill creek; thence crossing said creek in a straight line, continuing northeasterly along said original high-water mark until it intersects the end of the third course of this grant was in fee simple, absolute and unqualified. For a part of the consideration of the grant, the company gave to

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the trustees for the support of public schools, the joint bond the company and Asa Packer for \$82,000, secured by a mortgage on the premises granted.

Interest being in arrear and unpaid, the trustees for the support of public schools, on the 26th day of April, 1875, filed a bill in the court of chancery for the foreclosure of the mortgage, and a decree for the foreclosure and sale of the mortgaged premises was obtained on the 22d day of October, 1875. Under this decree a sale was made on the 26th day of December, 1878. The sale was set aside on application to the chancellor, on the ground of surprise and irregularities in conducting the sale. *Trustees &c. v. N. J. West Line R. R. Co.*, 3 Stew. Eq. 494.

Neither of the complainants was a party to the foreclosure suit, and in this condition of affairs they filed their bill, which gave rise to the decree appealed from.

The complainants' bill was filed on the 1st day of March, 1879. It claims title in the complainants, or some one of them, (1) as riparian owners; (2) under the wharf act of 1851; (3) under the act of 1860, authorizing the extension of the Central railroad from Elizabeth to some point or points on New York bay; (4) under the act of 1864, incorporating the American Dock and Improvement Company; and also, title by estoppel arising from expenditures in improvements made by tacit consent and sufferance of the state. In addition to a claim of title derived from these sources, the bill sets up a right in the Central Railroad Company, under a covenant contained in a grant made by the riparian commissioners to the Central Railroad Company on the 12th of November, 1874. By that instrument the riparian commissioners granted the company several tracts of land under water, within designated boundaries, for the consideration of \$300,000, excepting out of the same, among other things, whatever premises and privileges may have been granted to the New Jersey West Line Railroad Company by the supplement to its charter, and the grant made by the riparian commissioners in pursuance thereof, describing the premises by metes and bounds, in full, the same as contained in the grant to the West Line company of March 19th, 1872. Then follows the covenant in

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estion, which is in these words: "As to the premises included the said grant to the New Jersey West Line Railroad Company, it is agreed as follows: that in case the said state had not the right and power to vest the title in the said New Jersey West Line Railroad Company, which is, in and by the ninth section of the act approved February 29th, 1872, entitled, 'A Supplement to an act entitled, An act to charter the Passaic Valley and Peapack Railroad Company, approved March 29th, 1865,' and in and by the aforesaid grant, in pursuance thereof, provided to be vested in that company, which right and power the said state claims to have had, and the Central Railroad Company of New Jersey claims that the said state did not have, then and in such case the said state shall, for the consideration of one dollar, and for no other or further consideration to be paid to the state therefor, release to the Central Railroad Company of New Jersey, free from any encumbrance thereon by mortgage given to the state, all its right, title and interest in the said premises mentioned and described in the said ninth section of said act, and in said grant to the said New Jersey West Line Railroad Company."

In this immediate connection the bill contained averments that the grant of the riparian commissioners to the West Line Company was not within the purview of the ninth section of the act of 1872, as not being a grant of lands which "happened to come" within the location of the route of its railroad, because of the fraudulent character of such location. But the allegations on this head are foreign to the contents of the covenant in question. The condition expressed in the covenant, on which it is stipulated that the state shall release to the Central Railroad Company its right, title and interest in the premises, free from encumbrance, is dependent exclusively on the event of the state not having the right and power to vest the title in the West Line company, and not on the capacity of the West Line company to receive the grant. The grantee, having applied for and accepted the grant, could not, on the foreclosure of the consideration-money mortgage, set up the invalidity of the grant on the ground of its incapacity to receive it; nor does the cove-

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nant in the grant to the Central Railroad Company contemplated a release of the rights of the state in the event simply of the grant to the West Line Company having been ineffective.

The bill adds an averment that the complainants are, and for a long time have been, in the peaceable possession of the premises, and have placed valuable and extensive improvements thereon.

The complainants' bill is an original bill. The state is not made a party to it; nor is there any prayer for a conveyance by the state pursuant to the covenant. The parties made defendants are the Trustees for the Support of Public Schools, the New Jersey West Line Railroad Company, and William Z. Larned, its receiver; Asa Packer, and the purchaser at the sheriff's sale, which has been set aside; and sundry mortgage and judgment creditors of the West Line company. John Taylor Johnston is also made a defendant, but his interest is with the complainants as trustee of a title which he holds for their benefit. The prayer of the bill is, that the lands and premises comprised within the so-called West Line grant may be declared, by decree, to be free from the cloud or encumbrance of the trustees' mortgage—that the title of the West Line company and of the trustees be decreed to be invalid—that the trustees be restrained from proceeding to sell the mortgaged premises, and that peaceable possession thereof by the complainants may be preserved; and for an injunction to restrain the sale of the mortgaged premises and the disturbance of the complainants' possession thereof.

Upon filing the bill, the chancellor allowed a rule to show cause why an injunction should not issue, in accordance with the prayer of the bill, and enjoined all proceedings on the execution, which had been issued on the decree, until further order should be made. Answers were filed by the trustees, and by the executors of Asa Packer, in denial of the complainants' right to relief. Upon the bill, and these answers, and the affidavits annexed to the bill and answers, the argument of the rule to show cause was had. The chancellor discharged the rule, vacated the interim restraining order, and denied the injunction prayed for

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in the bill. From this order of the chancellor the complainants appealed.

I assume that the bill is adapted to obtain relief under the act entitled, "An act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," (*P. L. of 1870 p. 20, Rev. 1189*); for it was so considered by the chancellor, in his opinion. Independent of the covenant contained in the grant by the riparian commissioners to the Central Railroad Company, of November 12th, 1874 (which will presently be considered), the bill was designed to put the respective titles of the complainants, and of the West Line company, in a train for judicial determination. To a bill of such a scope, only, the state is not a necessary or proper party, for the state had parted with its entire title to the premises in dispute, by its grant to the West Line company, in 1872. It will also be observed that the order appealed from was one simply dissolving an interim injunction, and denying an injunction to stay a sale by the trustees under their foreclosure decree until the question of title should be determined. The complainants' bill was not dismissed, and the subject-matter of the litigation between the rival claimants to ownership of the property remains in the court of chancery, still undisposed of.

On this presentation of the case the sole topic for discussion is whether the trustees, in the situation of their foreclosure suit when this bill was filed, should, under the circumstances, be stayed from proceeding to a sale under their decree until a determination of the disputed title may be obtained. Except so far as shall be needful to decide the issue raised by the appeal, none of the interesting and important questions discussed so thoroughly by counsel will be adjudged or considered.

The trustees for the support of public schools are a board constituted for the administration of so much of the public revenue as is appropriated for the maintenance of public schools. It consists of the governor, the president of the senate, the speaker of the house, the attorney-general, the secretary of state, and the comptroller, for the time being. These public officials are constituted trustees of the fund for the support of public schools

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legatee had been convicted of felony; the attorney-general made a party to the bill for the purpose of having the question decided whether upon the conviction the legacy did not pass the crown by forfeiture. In *Dolder v. Bank of England*, 10 s. 352, the court refused to order dividends of stock purchased by the old government of Switzerland to be paid into court on the application of the new government, until the attorney-general was made a party, in view of a possible claim that the property passed to the crown as property derelict. In *Barry v. Russell*, 3 Ves. 424, the controversy was over bank stock purchased by the government of Maryland before the American war; and, as appears on page 435 of the report of the case, the attorney-general was made a defendant and filed an answer. In *Maker v. Sutton*, 1 Keen 224, the attorney-general was made a party defendant to a bill filed to determine the validity of a charitable bequest. In all cases of charitable bequests, except where the bequest is to an officer of an established institution, the attorney-general is a necessary party to the bill, because the king, *paterfamilias*, superintends all such charities and acts by the attorney-general, who is his proper officer in this respect. *Well-loved v. Jones*, 1 Sim. & Stu. 40. When the attorney-general, an officer of the crown, is made a defendant, the bill, instead of praying process against him, prays that he may answer it upon being attended with a copy. *Story's Eq. Pl.* § 44, note.

Exemption from liability to be sued is the personal privilege of the sovereign; and if there be any officer of the government who is its representative with respect to the particular matter of the suit, he may be made a party to the suit, though the litigation concerns the public revenues. Practical illustrations of the application of this principle are common. In *State on the prosecution of the M. & E. R. R. Co. v. Yard*, a suit was prosecuted against the commissioner of railroad taxation, an officer of the state, to restrain the collection of taxes assessed, and a decision was had by the supreme court of the United States that the assessment was invalid as against the prosecutor. 8 Vr. 228; 95 U. S. 104.

The property in the fund set apart for the support of the

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public schools is by law vested exclusively in the trustees t on the trusts declared by the statute. They are made cust of the fund, free, by constitutional provision, from ev control of the legislature, except in the designation of th of application to the support of public schools. The i ments of it are required to be in the name of "The T for the Support of the Public Schools." Mortgages are by their statutory title, and suits are prosecuted in that t the foreclosure of such mortgages. For the purposes administration of the fund of which they are made cust and of the rights and remedies upon or against the secur which it is invested, the trustees are constituted the repr tives of the state. Suits brought in the name of the trust the foreclosure of mortgages are subject to the same defe answer or cross-bill as like suits by other mortgagees. In such as the complainants have brought, a mortgagee of the of the adverse title is a proper but not a necessary Though the complainants may not be able, as against th tees, to present some of their grounds for relief, for the that the trustees are not the proper parties to litigate the trustees were properly made parties to this bill, and the prayed may, if the grounds of it are otherwise suffici decreed against them.

The complainants seek the relief prayed for on two gr

First. The complainants rely on the covenant contained grant made by the riparian commissioners to the Centra road Company. The bill construes this covenant as an ment by the state to release the premises, to discharge th gage in question, and that it would not dispose of the titl premises by foreclosure or otherwise until it should be mined whether said title is valid as against the title of th tral Railroad Company and those holding under them covenant is executory in terms and legal effect, and can executed by a bill for a specific performance. To such a state is a necessary party, and the trustees are not its repr tives in such a litigation. In the next place, the cover the riparian commissioners were competent to make it, i

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erative and void as against the trustees' mortgage. By the constitution, "The fund for the support of free schools, and all money, stock and other property which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed, to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public schools for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretence whatever." *Art. IV. § 7 ¶ 6.* By an act passed on the 6th of April, 1871, entitled "An act to increase the school fund of the state," it was enacted that "all moneys^o hereafter received from the sales and rentals of the land under water belonging to the state shall be paid over to the trustees of the school fund, and appropriated for the support of free public schools, and shall be held by them in trust for that purpose, and shall be invested by the treasurer of the state under their direction in the same manner as the funds now held by them are invested; the same to constitute a part of the permanent school fund of the state, and the interest thereof to be applied to the support of public schools in the mode which now is or hereafter may be directed by law, and to no other use or purpose whatever." *P. L. of 1871 p. 98; Rev. p. 1081 § 67.* By the ninth section of the act of 1872, under which the West Line grant was made, it was provided that the consideration of the grant should be paid by the company to the trustees of the school fund. Instead of receiving the consideration-money in cash, the trustees, for part of it, took a bond secured by this mortgage. The mortgage was executed, delivered and accepted by the trustees. The appropriation of the money secured by it was consummated, and it became a part of the perpetual school fund, within the meaning of the constitutional provision, and is protected by it. The legislature could not borrow, appropriate or use it for any other purpose than that for which it was set apart.

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The mortgage was made in 1872; the grant to the Central Railroad Company was not made until 1874. The riparian commissioners had no power in 1874 to release or discharge a mortgage which before that time was an investment of part of the school fund. The legislature itself could not impair the security or discharge the mortgage except by passing an equivalent into the treasury for the benefit of the school fund. The title of the trustees, and of any purchaser at the sale of the mortgaged premises, may fail because of its inherent infirmity, but it cannot be impaired by a covenant with respect to the mortgaged premises, made by the riparian commissioners after the mortgage was executed and delivered.

Second. The other ground for relief is a claim of title in the complainants anterior to the grant to the West Line and to the mortgage of the trustees. If the title claimed by the complainants is clothed with the qualities and circumstances set forth in the bill, a sale in the foreclosure suit will not affect it. The complainants were not parties to the foreclosure suit and would not be concluded by the record; the purchaser at the foreclosure sale, though not a purchaser *pendente lite* with respect to the suit, would take his title with notice actual or constructive of the complainants' rights, and may be made a party to this suit for the purpose of litigating the title of the West Line company under its grant. If the complainants are entitled to restrain a sale under the trustees' foreclosure suit, it must be in virtue of some collateral equity which would justify such a measure of relief.

Before discussing this subject, it will be appropriate to consider for a moment, the claim put forth by the complainants' counsel, on the argument, for relief, under the answer of Larned, the receiver of the West Line company. This answer appears in the record sent up to this court, but was not before the chancellor on the hearing on which the order appealed from was made. It was not filed until the 9th of February, 1880. Larned, in his answer, affirms the validity of the title of the West Line company, but charges that it would be inequitable to dispose of the title by foreclosure, or otherwise, until its validity as against the claim of title by the complainants should be

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ned, suggesting an equity in the mortgagor to have the sale made upon an unclouded title. Aside from the fact that this answer was not before the chancellor when he made his decree, it cannot avail the complainants on this appeal. If a mortgagor be entitled to have a sale under foreclosure proceedings delayed, until it may be made under circumstances advantageous to his interests, he should seek the indulgence in the present suit. In the next place, the complications which have been cast a cloud upon the mortgagor's title, arose before this decree was made. The mortgagor took its title from the grant with full knowledge of the situation of the premises. A mere defect in the title conveyed would have afforded no defence in the foreclosure suit, though the mortgage was given directly for the purchase-money. *O'Brien v. C. E. Gr.* 471. The covenant in the grant by the commissioners, in 1874, to the Central Railroad Company would not impair or affect the mortgagor's title, if title was taken under the grant of 1872. If the covenant was made liberally, and tends to impair the salable value of the mortgaged premises, it was an act for which the mortgagees are equally responsible. A mortgagor who mortgages an encumbered title, or whose title has subsequently become clouded, in the absence of fraud, has the foreclosure proceedings set back on account of an apprehension that the mortgaged premises will not bring full value at a foreclosure sale. The remedy is by redemption.

In arching for an equity to entitle the complainants to an injunction to stay a sale until the validity of the contested title is determined, it must be borne in mind that the titles of the complainants, respectively, are legal titles. Even the rights of the complainants, claimed in the bill, as derived by estoppel, must be regarded as a legal title—a title acquired by a riparian owner by reclamation. It can have no other foundation as against the state. Independent of the statute, a court of equity has jurisdiction over the subject-matter of the dispute. The statute confers a jurisdiction of this character to settle the title only where the complainant is in peaceable possession.

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sion, and no suit be pending to enforce or test the validity of the adverse title, claim or encumbrance. *Rev. p. 1189*. I do not propose to discuss the question whether the bill was properly filed against the West Line company under this statute. Such a discussion is not necessary to the subject under review—whether the chancellor should have enjoined the mortgagees from a sale under the decree of foreclosure.

The decree was regularly obtained in the orderly prosecution of proceedings for foreclosure. The stay of execution and sale under the decree is sought by parties who were not parties to the foreclosure suit, and against whose claim of title a sale will be destitute of all legal force. A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the manifest reason that the sale will not prejudice the rights of the latter, and the question of title is properly triable in a court of law. *Freeman v. Elmendorf*, 3 Hal. Ch. 475; *S. C. on appeal*, *Id.* 655. To warrant resort to the restraining power of the court, the case must present some recognized ground for equitable relief—fraud, or irreparable injury.

Mr. High, speaking on this subject, says: “While the cases on this subject are far from reconcilable, the clear weight of authority is in favor of the proposition that, in the absence of fraud or gross injustice and irremediable injury, courts of equity will not entertain jurisdiction in restraint of judicial sales under executions against third persons having no title to the property sold.” *High on Inj.* § 266. Another principle which enters into the consideration of the matter presented by this appeal is, that courts interfere with great reluctance with the collection of the public revenues. *Jersey City v. Lembeck*, 4 Stew. Eq. 465, is an illustrative precedent. The city had laid an assessment on the complainant’s lands, which, by the city charter, was an encumbrance; the assessment was invalid; no suit was pending in which the validity of the encumbrance could be tested. The complainant filed a bill under the statute against the city to settle the title to the land and determine the validity of the encumbrance. This court denied relief, on the ground that the

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inant might have had relief by a writ of *certiorari*, which lost by his own laches. To justify resort to a court of to stay the collection of public revenues, the party must case strictly within the bounds of equity jurisdiction—ury otherwise not remediable; and he must seek and ite his remedy with promptitude.

trustees' mortgage is an investment of a fund, the interest ch the statute and the constitution contemplate shall be l annually to the support of public schools. The amount the mortgage when the decree was signed, by the accumu- of interest unpaid, had reached the sum of \$99,345.80. he 8th of January, 1870, an information was filed in the of chancery by the attorney-general in the name of the gainst the Central Railroad Company, complaining of hments upon lands of the state which included the parcel rds granted to the West Line company. In this suit the the complainants might have been presented for deter- on. On the 24th of December, 1870, the attorney-gen- ed a petition supplemental to the information, asking an ion, on which a rule to show cause was granted, and a ary injunction was allowed restraining the Central Rail- ompany from making improvements on the premises. njunction order was continued by consent until a final ; should be had. The act authorizing the grant to the Line company was passed February 29th, 1872. By this trustees were authorized to require payment in cash of nsideration of any grant that might be made under its ons. In lieu of cash they consented to accept for part of nsideration the mortgage in question as an investment for enefit of the school fund. The West Line grant, although s date on the 19th of March, 1872, was not in fact exe- and delivered until about the 21st of May, 1872. On th of May, 1872, formal notice of the grant was served officers of the Central Railroad Company by the West ompany; and on the 27th of February, 1873, the Cen- ilroad company filed its answer to the information of orney-general, in which, while denying the power of the

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state to make the West Line grant, it set up the grant in bar of the right of the state to proceed with the information.

The foreclosure bill was filed April 26th, 1875, and a final decree taken October 22d, 1875. On the 10th of January 1876, Mr. Johnston, to whom the complainants had made conveyance of the premises for the purpose of giving the federal courts jurisdiction over this controversy, filed in the circuit court of the United States for the district of New Jersey a bill of the same import as the bill in this case, asking substantial the same relief and an injunction staying a sale under the foreclosure decree, which injunction, not having been renewed at the next succeeding term, expired by force of the rules and practice of the federal courts, and was, on the 30th of November, 1878, discharged on motion of the attorney-general. The complainants' bill was not filed until the 1st of March, 1879.

By reason of delays consequent on this litigation, down to this period, the trustees have not been able to realize the interest on this fund, which by law should have been applied annually to the support of the public schools. The mortgaged premises will now bring at a sale the amount due on the decree, although, with interest and costs, it nearly equals the price for which the premises were sold to the mortgagor. There is no reason to suspect that the trustees are permitting the decree to be used in the interest of either of the principals in the litigation, or are pressing the sale from any other than the laudable purpose of securing the money for the public treasury, and enabling them to receive and apply the interest which may accumulate upon it to the use to which it is devoted. These public officers, in the execution of the trust confided to them, have a well-fortified claim that they shall be permitted to administer this fund and apply it as the law prescribes, and that investments of it should not be subjected to the delay and vicissitudes of a litigation that promises to be uncommonly protracted, with a possible result that at the end the mortgaged premises may be inadequate to satisfy the decree and accumulated interest, or their mortgage title be entirely defeated.

The bond taken by the chancellor on setting aside the former

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There is no answer to the urgency of the trustees that the property shall be again sold. Ample as the sureties on the bond are, it is no equivalent for a vendible mortgage estate which, in the market, will bring the money. For one contingency the bond is no security whatever. Its condition is, that on a resale the premises shall bring the amount then due on the execution for debt, interest and costs, together with the lawful expenses. The condition does not apply in the event of the complainants' success in this suit in obtaining the injunction prayed for, perpetually enjoining a sale. It leaves the hazard of that result upon the mortgagees. Nor does the bond fulfill the purposes for which the collection of the mortgage-money is urged. The trustees are entitled to have the money invested so that the interest may be available for use annually in the support of the public schools.

The surety on the trustees' bond has equities, too, that cannot be lightly regarded. His estate has no indemnity for his liability on the bond except the vendible value of the mortgaged premises, and the obligation of a bankrupt corporation in the hands of a receiver. Now the indemnity from the first source is ample. A sale of the mortgaged premises will pay the debt. His executors have filed an answer praying a sale of the mortgaged premises for the purpose of securing a release of the estate of the deceased from liability on the bond. They submit to the court that, if the title asserted by the complainants should turn out to be superior to that granted by the state to the West Line company, the complainants have no equity as against the estate of their decedent to hinder, delay or prevent a sale of the mortgaged premises. The force of this prayer seems to me to be undeniable. It presents considerations of pre-eminent weight on an application to a court of equity for a discretionary writ, which is never allowed except on a clear preponderance of equity on the side of the applicant.

Against the equities of the trustees and the surety on the bond, the complainants oppose equities derived from two sources. First, they say that if the premises are sold in the foreclosure suit, and are purchased by other parties, the Central Railroad

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Company will lose the improvements made upon them, in case the West Line grant proves to be valid. Inasmuch as the title of the Central Railroad Company might have been tested and determined in the information suit of 1870, which was pending when the West Line grant was made, this contention has little weight as against the mortgagees and the surety on the bond. The complainants may dispel the risk of an issue unfavorable to their title by redemption of the mortgage, or by purchasing at the sale. Having delayed, if not evaded, a trial of title in the information suit, the complainants, after the mortgagor has become insolvent and the foreclosure suit has been prosecuted to a final decree, have no equity to subject the surety to delay, and the consequent risk that the mortgaged premises may finally be inadequate to satisfy the mortgage debt, or to cast upon the mortgagees the risk of an unfavorable termination of this litigation.

The other ground of the complainants for equitable relief is based on the covenant contained in the grant of the riparian commissioners to the Central Railroad Company in 1874. I have shown that this covenant is legally inoperative against the trustees' mortgage. The defendants' counsel push this matter further. They contend that the covenant is invalid as against the state, for want of power in the riparian commissioners to bind the state by covenants not annexed to the lands actually granted. A discussion of this problem at this time would lead beyond the bounds proposed by this opinion, and is not necessary to the question proposed to be decided; for the complainants' counsel place their argument on this head on matters collateral to the grant, and independent of the validity of the covenant. They say that for the grant the Central Railroad Company paid into the state treasury the sum of \$300,000, which went into and became part of the school fund. Upon this fact they contend that the trustees are equitably estopped from repudiating the covenant and selling away the premises, so that the execution of the covenant by a grant of the premises in compliance with it would be made impracticable.

The equitable doctrine invoked is that a party who accepts a

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benefit must take it *cum onere*. He cannot have the advantage of one part of a transaction which enures to his benefit and repudiate other parts which are advantageous to the other party. If he voluntarily accepts a benefit from the transaction with knowledge of its import, he ratifies it as a whole, and he cannot repudiate its obligations without first restoring the consideration he has received. He must elect between entire repudiation, with a restoration of the benefits received under it, and complete adoption of the proceeding with all its obligations. The equity of a party who relies on an equitable estoppel to give validity to an inefficient contract is not to have his contract made binding, but to put his adversary to an election between performance of the contract and repudiation of it upon equitable terms.

The doctrine of equitable estoppel presupposes that the person against whom it is set up has the volition to accept or reject the proffered benefit, and power to restore the consideration if received. The endeavor to apply it to this case springs from a misconception of the relations between the trustees for the support of public schools and the riparian commissioners, and of the powers and duties of the trustees in the management of the school fund. The trustees have no control over the state's lands under water. Whatever control the state has given over these lands it has entrusted to the riparian commissioners, an independent legislative board. The trustees have no authority to decide what lands under water shall or shall not be sold, or to fix the price or dictate the terms and conditions on which sales shall be made, nor power to rescind contracts of sale made by the riparian commissioners, which they may deem prejudicial to the school fund. They have not even the capacity to determine from what sources the revenues for the support of public schools shall be derived—no choice as to what moneys shall or shall not become part of the school fund. These are matters exclusively within legislative discretion. The powers and duties of the trustees in relation to the school fund are purely executive and ministerial—to invest the fund and appropriate its income annually to the support of public schools. They could not lawfully abstract from the school fund the money needed, on the

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principles of equitable estoppel, to effect a rescission of the grant to the Central Railroad Company, on the hypothesis that the grant was injurious to the interests of public schools. When moneys accumulated from legislative grants become part of the school fund, the legislature is prohibited by constitutional inhibition from withdrawing them or impairing investments of them, directly or indirectly. The constitutional protection of the school fund would be of little avail if another legislative board, by contracts it might make, could produce the same result by equitable estoppel, against which the trustees, in whose custody the school fund is lodged, cannot relieve themselves.

The people of this state have shown the utmost solicitude for the integrity of this fund. Considerations of public policy require that the courts should give to the fund the full measure of protection the constitution has placed over it, and should, as far as consistent with the rules of law, resist every effort to impair the investments of the fund, or embarrass the trustees in the administration of it in the manner prescribed by law. It is undeniable that a stay of the collection of this mortgage until this litigation shall be ended—depriving the trustees of the yearly interest, which should be applied annually to the support of schools—would prevent the trustees performing a public duty obligatory upon them with respect to this part of the fund. The Central Railroad Company accepted its covenant with notice of the trustees' mortgage, and of the nature of the trust on which the investment was made—knowing that the covenant was not legally binding upon the trustees, and chargeable with knowledge that it was the duty of the trustees to collect the mortgage whenever the investment failed to bring in interest for use annually for the support of public schools. Having accepted the covenant with knowledge of the condition of affairs, the company has no equity to interpose the inconvenience and embarrassments that might arise to it from that source between the trustees and the duties these public officers are required to perform. It is said that the state, recognizing its obligation under the covenant made by the riparian commissioners, will make good to the school fund the money secured by this mortgage; but, until that

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actually done, I do not see how the anticipation that it may one can be made to square with the constitutional provision the legislature cannot borrow or appropriate the fund to any other than the purposes for which it is held by the trustees. If it should be conceded that, out of this covenant and circumstances surrounding it, an equity might arise in favor of the complainants as against the mortgagees to have a sale of mortgaged premises postponed until the title to the premises should be settled, these facts can be of no avail against the personal representatives of the surety on the bond. His obligation entered into before the covenant was made. Neither he nor the corporation he was interested in, has derived any advantage from it. So far as their interests are concerned, the covenant was designed in hostility to the title of the West Line company, under its grant, to give the complainants a supposed better point from which to controvert its validity.

The covenant will create an equity in the complainants to be allowed to redeem the mortgage and be subrogated to the rights of the mortgagees in the decree, so far as to give protection against a sale under it pending this litigation—subject, however, to the equities of the personal representatives of the surety on the bond. The covenant, if it be valid and binding on the state, will serve to confer on the covenantee a standing on which to controvert the power of the state to make a grant of land under its title to any other person than the adjacent riparian owner. It will also, in that event, lay the foundation of a claim to reimbursement by the state of the outlay incurred in the redemption of the mortgage, on the happening of the contingency on which the covenant was made to depend. But it cannot be made available to the complainants against the indisputable equity of the mortgagees and of the personal representatives of the surety on the bond, to have the mortgage and the liability of the surety removed out of this litigation and disposed of in the condition of things as they were when the mortgage was given and the obligation of the surety was incurred.

The decree of the chancellor denying the injunction should be affirmed.

Decree unanimously affirmed.

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JOSEPH WHARTON, appellant,

v.

LUKE J. STOUTENBURGH, respondent.

1. The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding upon them, and which, for greater certainty or to answer some requirement of the law, they designed to have expressed in a formal written agreement.

2. Where, in cases within the statute of frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully-authorized agent, there exist all the materials which the court requires to make a legally-binding contract.

3. Where the negotiations have been conducted by parol, or are partly evidenced by writings duly signed and partly rest in parol, and specific performance is sought on the ground of part performance, the terms of the contract must appear clearly, definitely and unequivocally. But it is sufficient that the terms of the contract be made out in a manner satisfactory to the court. The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were and giving effect to the agreement, if the complainant shows himself entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement.

4. Delivery of possession by a vendor or lessor, accepted and acted upon by the vendee or lessee, is such an act of part performance by the former as to take the contract out of the statute of frauds, and to justify a decree of specific performance against the latter.

5. Courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts, where the terms and provisions are such that the court could not carry its decree into effect

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exercising some personal supervision and oversight over the work extending over a considerable period of time, such as agreements to build, to construct works, build or carry on railways, mines, and a contract for a lease of mines, to be worked in a specified manner, on this principle. The court, in such cases, can grant relief at once that the lease be executed, leaving the complainant to his legal remedy hereafter for breaches of the covenants contained in it.

made an agreement for a lease for a term of years—the agreement in writing and signed as required by the statute of frauds—the possession, and then refused to execute a lease. On a bill by the complainant for specific performance—*Held*, that it was proper that it should be decreed that the lease to be executed should bear date as of the time when it was taken.

Appeal from a decree for specific performance of a contract to execute a mining lease of lands, advised by Vice-Chancellor.

Bill was filed by the complainant, who is the respondent in equity, for the specific performance of an agreement for a lease.

The complainant is the owner of a tract of mineral lands containing about one hundred and ten acres, situate in the county of Luzerne, on which two separate veins of iron ore had been discovered and worked.

In January, 1880, James H. Collins, agent of Mr. Wharton, proposed to Mr. Stoutenburgh to make a lease of the lands to Mr. Wharton, who resided in Philadelphia. As the result of such conference, Mr. Stoutenburgh made and signed the following proposition, to be sent by Mr. Collins to Mr. Wharton:

“January 9th, 1880.

For mine I will lease in permanence for twenty years, with the conditions of surrender in case the mines may prove unproductive, for \$100 a ton, with usual privilege of necessary buildings.

For mine I will lease for twenty years at the rate of royalty of \$10 a ton for the first two years—sixty cents a ton thereafter—pig-iron not above thirty dollars per ton; but when pig-iron shall be worth \$30 or over, seventy cents royalty, so long as pig-iron remains over

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said thirty dollars. Or, I will lease all the mines on Mine Farm to Mr. Wharton for twenty years at the rate of seventy cents royalty, but will require the working of both veins.

"L. I. STOUTENBURGH."

This proposition was sent to Mr. Wharton, who made the following reply :

"PHILADELPHIA, January 21st, 1880.

"L. I. Stoutenburgh, Esq."

"DEAR SIR—Mr. Collins reports that under all the circumstances he advises my acceptance of your proposition of ninth instant, for leasing your magnetic ore lands on Schooley's Mountain. This I concluded to do, and in fact have regarded the arrangement virtually made since receiving your said proposition.

"Of course a formal lease will be prepared and signed by us at a most convenient time, before the expiration of your existing contract to deliver ore which I understand will be complete some time in March.

"Please acknowledge receipt of this and thus confirm the bargain.

"Yours truly,

JOSEPH WHARTON."

In answer to the last above, Mr. Stoutenburgh sent the following :

"SCHOOLEY'S MOUNTAIN, January 23d, 1880—

"Joseph Wharton, Esq.:

"DEAR SIR—Yours of the 21st instant, by the hands of Mr. Collins, is received.

"In reply would say that I will adhere to the proposition made you through Mr. Collins on the 9th instant, although my mine is looking much more promising than then. I infer from your letter that you wish not only the one mine that I am now working, but that your lease should include all the magnetic ore of the farm.

"As there are two distinct veins of ore, each of which have been opened and partially worked, you will remember that my proposition specified the working of each vein, so that I would have a greater income from both than from one.

"At the time of making the proposition to Mr. Collins it was also understood that if you should lease the whole property that you would take my machinery and mining improvements at a fair valuation.

"I have thought best to mention these items so as to have no misunderstanding about it when the lease is taken.

"I expect to complete my contract with the Lehigh Iron Company about the middle of March.

"In order to have all things ready in time for you to take possession at the termination of my contract with said company, I will write and send you such

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lease as I may think equitable, for your consideration and approval, if it
hall suit you. I am very respectfully yours,

"L. I. STOUTENBURGH."

The above letter of the 23d of January was endorsed and sent
in one to Mr. Collins, of the 24th, of which the following is a
copy :

"SCHOOLEY'S MOUNTAIN, January 24th, 1880.

"**J. H. Collins, Esq. :**

"**DEAR SIR**--Inclosed please find an open letter to Mr. Wharton, which if
on **reading** you find to accord with my proposition of the 9th inst., and our
con **versation** about machinery &c., please forward to him. If not, then
please return to me, with comments.

"I am very respectfully yours,

L. I. STOUTENBURGH."

The letter of the 23d of January was forwarded to Mr.
Wharton by Mr. Collins, without the return, with comments,
mentioned in the letter to him of the 24th.

As the outcome of the correspondence between the parties,
Stoutenburgh prepared a lease and sent it to Wharton. Subse-
quently the parties by appointment met at the Clarendon Hotel,
in **Hackettstown**, on the 25th of February, 1880, to consider the
details of the draft prepared by Stoutenburgh. Alterations and
changes were made in its provisions, and erasures and interlinea-
tions were made accordingly.

The draft, as corrected, was left with Stoutenburgh, that a
lease in duplicate might be prepared and sent to Wharton for
signature. Within two or three days after the interview at
Hackettstown, Stoutenburgh prepared two copies of a lease,
which he signed and sealed and forwarded to Wharton, in Phila-
delphia—one to be retained by him, and one to be executed and
returned. Wharton acknowledged the receipt of these papers as
follows :

"CAMDEN, N. J., March 4th, 1880.

"**L. I. Stoutenburgh, Esq. :**

"**DEAR SIR**—I have your two copies of the lease and shall give the matter
attention to-morrow. Was closely occupied with other matters yesterday, and
shall be to-day. The house you spoke of had better be shown to Collins.
What do you ask for it? I should think he might want it.

"Truly yours,

JOSEPH WHARTON."

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The mines and premises were taken possession of by Wharton on the 6th of March, 1880, through his agent and employees. Possession was retained until the following month of August, when the defendant quit the premises.

In November, 1880, Stoutenburgh filed a bill against Wharton, praying that the defendant be decreed to execute and deliver the lease, as mutually agreed on by the parties, at Hackettstown, on the preceding 25th of February, 1880. The chancellor, on the advisory opinion of the vice-chancellor, made a decree accordingly. From that decree this appeal was taken.

Mr. Peter L. Voorhees, for appellant.

I. No specific performance of a contract will be decreed unless the contract be actually concluded and be certain in all its parts. If the matter is still pending or rests in treaty, or if the agreement, in any essential particular, be uncertain, equity will not interfere. *Pomeroy on Spec. Perf.* §§ 35, 36, 58; *Fry on Spec. Perf.* § 203, *Waterman on Spec. Perf.* § 141; *McKibbin v. Brown*, 1 *McCart.* 13; *Potts v. Whitehead*, 5 *C. E. Gr.* 55.

II. The mere approval of a draft of a contract does not constitute such an agreement as will be decreed to be specifically performed. *Fry on Spec. Perf.* § 342; *Pomeroy on Spec. Perf.* 87, notes to § 63; *Waterman on Spec. Perf.* 175, notes to § 135; *Potts v. Whitehead*, 5 *C. E. Gr.* 58; *S. C.*, 8 *C. E. Gr.* 514; *Warren v. Wellington*, 3 *Drew.* 523; *Doe v. Pendegrifh*, 3 *C. & P.* 312.

III. Courts of equity will not enforce the specific performance of a contract if it be reasonably doubtful whether the contract was finally concluded. *Fry on Spec. Perf.* §§ 164, 165; *Pomeroy on Spec. Perf.* § 58; *Waterman on Spec. Perf.* § 132; *Huddleson v. Briscoe*, 11 *Ves.* 591, 592; *Statford v. Bosworth*, 2 *Ves. & B.* 341, 345, 346; *Brown v. Wilson*, 2 *C. E. Gr.* 180.

IV. In order to take a case out of the statute of frauds, by

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part performance, two things are necessary. The terms of the agreement must be established by proofs clear and definite, and the act relied upon as part performance must be exclusively referable to the contract and done after the contract made. *Pomeroy on Spec. Perf.* §§ 102, 107, 123, 125, 130, 136; *Wallace v. Brown*, 2 Stock. 308, 309; *Brewer v. Wilson*, 2 C. E. Gr. 180; 1 Stew. Dig. 528, § 86, and cases; *Eyre v. Eyre*, 4 C. E. Gr. 102; *Petrick v. Ashcroft*, 4 C. E. Gr. 339; *Ackerman v. Ackerman*, 9 C. E. Gr. 315; S. C., *Id.* 585; *Cole v. Potts*, 2 Stock. 67; *Smith v. McVeigh*, 3 Stock. 239.

V. A contract will not be enforced if it was induced by misapprehension or misrepresentation. *Fry on Spec. Perf.* §§ 425, 426, 432, 437, 455, 457; *Pomeroy on Spec. Perf.* §§ 38, 210, 217; *Waterman on Spec. Perf.* §§ 118, 308, 310; *Fisher v. Worrall*, 5 Watts & S. 478, 482.

VI. When a contract is not fair and its enforcement would be oppressive, equity will not decree a specific performance. It is matter of discretion. *Pomeroy on Spec. Perf.* §§ 35, 38, 40, 177, 185, 188; *Waterman on Spec. Perf.* §§ 6, 168, 169; *Crane v. Decamp*, 6 C. E. Gr. 414.

VII. When a contract is a continuing one, running through an extended term, or where it provides that one of the parties may abandon contract on giving a year's notice, it will not be enforced. *Pomeroy on Spec. Perf.* §§ 42, 289, 307, 312; *Waterman on Spec. Perf.* §§ 197, 198; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Rops v. Pacific R. R.*, 1 Woolw. 264, 448; *Fallon v. R. R. Co.*, 1 Dill. 121; *Blachett v. Bates*, L. R. (1 Ch. App.) 117, 124; *Hill v. Croll*, 2 Phil. 60.

Mr. H. C. Pitney, for respondent.

I. The correspondence of January, comprised in complainant's proposition of January 9th, defendant's letter of January 21st, and complainant's reply, make out a complete contract in writing, signed by the parties, subject only to the contingency of

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their agreeing upon the details of the lease. They afterwards did agree fully and completely upon the terms of that lease.

II. Under such circumstances the original contract will be enforced, and the statute of frauds is satisfied. *Chinnock Marchioness of Ely*, 11 Jur. (N. S.) 32; 2 Hem. & M. 220 De G., J. & S. 638, 646; *Honeyman v. Maryott*, 1 Jur. (N. S.) 857, 21 Beav. 14.

III. Defendant received the leases, duly executed by complainant, on or before March 4th, and kept them without returning them until May 27th.

IV. But if the court should hesitate to decree specific performance for the reasons thus far presented, their still remains further and decisive consideration of part performance.

Possession was abandoned by complainant and taken by defendant's agent, March 6th. *Pyke v. Williams*, 2 Vern. 455, and Raithby's note; *Aylesford's Case*, 2 Str. 783; *Harris v. Knickerbocker*, 1 Paige 209; S. C., 5 Wend. 638; *Pugh v. Good*, 3 Watts & S. 56; *Bowers v. Cator*, 4 Ves. 91; *Parker v. Smith*, 1 Coll. C. C. 608; *Coles v. Pilkington*, L. R. (19 Eq.) 174.

V. All mines are peculiarly speculative and uncertain in value, and so recognized by the courts. Defendant was himself an expert, and the courts do not permit such persons, dealing in such property, to recede from their contracts on account of any change in the prospects of the yield, when they have themselves inspected the property. *Fry on Spec. Perf.* §§ 437, 438, 440, 443, 444, 445; *Atwood v. Small*, 6 Cl. & Fin. 167, *232; *Clapham v. Shillito*, 7 Beav. 146; *Jennings v. Broughton* 17 Beav. 234, 17 Jur. 905, 5 De G., McN. & G. 126.

VI. As to its being a hard contract, see *Fry on Spec. Perf.* §§ 252, 256, 257; *Waterman on Spec. Perf.* §§ 165-173; *Low v. Treadwill*, 12 Me. 441-450; *Lee v. Kirby*, 104 Mass. 420-428.

VII. It was argued below that this was an attempt on the

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of complainant to induce the court to enforce a continuing contract by ordering defendant to work a mine and raise ore; it was urged that the court would not undertake the task of revising the working of a mine.

This is fallacious. We are not asking the court to carry out a continuing contract. What we ask and all we ask is that defendant shall execute this lease according to his agreement, that it should be dated back to the time when he should have executed it, as was done in *Pain v. Coombs*, 1 De G. & J. 14.

The opinion of the court was delivered by

MEPUE, J.

The principal ground of contention against this decree is that no contract, definite and complete in all its terms, was concluded between the parties.

The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not concluded their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement.

The question as to the degree of completeness in an agreement requisite to relief by way of specific performance has generally arisen when the negotiations have been conducted in writing, and the inquiry has been whether the writings produced comply with the requirements of the statute. In *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 645-6, Lord Westbury stated, with precision, the doctrine of courts of equity. He said: "I entirely accept the doctrine that if there had been a contract, agreement, and the terms of it are evidenced in a manner

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to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this court requires to make a legally binding contract. But, if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

Substantially the same views are expressed by Lord Cranworth, in *Ridgway v. Wharton*, 6 H. of L. Cas. 264, 268, in which he affirms the binding force of an agreement, all the terms of which have been agreed on, though the parties contemplated that the agreement should be reduced into form before it is finally executed; and, in referring to the fact that a formal agreement was in contemplation before the business was to be concluded, as cogent evidence that the parties did not intend to bind themselves until the agreement was reduced into form, he adds: "That, however, is a question of fact, which must depend upon the circumstances of each particular case." Other cases to the same effect are collected in a note in *Pomeroy on Cont.* 89.

The doctrine of the courts is the same with respect to the enforcement of agreements within the statute of frauds, where the negotiations have been conducted by parol, or are partly evidenced by writings duly signed, and partly resting in parol, and specific performance is sought on the ground of part performance of the agreement. The terms of the contract must be established by proofs, clearly, definitely, and unequivocally. But it is sufficient that the terms of the contract be made out in a manner satisfactory to the court. The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were, and giving effect to the agreement where a complainant shows him-

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self to be entitled to a specific performance, by a part performance, which shall be referable only to a part execution of the agreement. 1 *Sugd. Vend. & Pur.* [155] ¶ 10; *Wallace v. Brown*, 2 *Stock.* 308; *Pomeroy on Cont.* §§ 137-145.

The agreement, as contained in the complainant's proposition of January 9th, 1880, and the defendant's reply of January 21st, 1880, was so incomplete as not to justify a decree of specific performance. Both parties then evidently contemplated a future settlement of the terms and details of a lease, thereafter to be agreed on. They subsequently, at the interview in Hackettstown of the 25th of February, 1880, completed the arrangements designed to perfect the understanding between them.

The vice-chancellor before whom this case was heard found, as a question of fact, that the draft of a lease prepared by Stoutenburgh, with the alterations and changes made in it at the interview in Hackettstown, was satisfactory to both parties, and that the writing, as amended and corrected, though not signed, was a full and complete expression of the terms and stipulations finally agreed on between them. A careful examination of the evidence leaves no doubt of the correctness of this conclusion.

The negotiations, as concluded in Hackettstown, although evidenced by the written draft of a lease as amended and altered by mutual consent, were not embodied in any agreement signed by the parties in conformity with the statute of frauds. If the matter had ended there, the statute would have been a complete defence. The defendant could then have rested successfully on what he calls, in his testimony, his option to sign the lease or not to sign it, as he thought proper.

But the evidence shows that a lease in duplicate was forwarded to the defendant for execution, shortly after the 25th of February, the receipt whereof was acknowledged by the defendant's letter of the 4th of March. On the 6th of March, the defendant's agent took possession of the premises. On the same day, the defendant, at Philadelphia, wrote a letter to the complainant, in which he says:

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"In view of the great delays in getting furnace started, and in starting hematite mines at Beattystown, and also in view of the large purchases of ore which I have made, I confess that the prospect of working your place looks less attractive and more onerous than it did. I wish, therefore, to let the matter stand, if it can be done without disadvantage to you, until I come up to Hackettstown, which I mean to do directly after hearing that the furnace is in blast; this, I imagine, will be about the middle of next week."

On the 9th of March the complainant replied, saying:

"You will allow me to say, in all kindness, that I was a little surprised in receiving your letter without the duplicate copy of lease that I sent you. I regarded our business as finally settled, at our last meeting at Hackettstown, as though the leases had there been formally signed, and have shaped all my business in accordance with that transaction. Have written to several gentlemen and companies which had put themselves in communication with me for the purchase or lease of the mine, that it was already positively and satisfactorily leased. This is the condition in which our affairs pertaining to the mine now are, and have been since Saturday, and, of course, any other arrangement than that specified in our contract would be damaging to me."

Possession was taken of the mine on the 6th of March, by the defendant's agent, without his knowledge, and on the complainant's suggestion, to prevent the flooding of the mine with water. But the defendant had notice early in April of what was being done, for he then sent up an engine and pump, with directions to have them set up in the mine. After complainant's letter of March 9th, the defendant was in duty bound to act with the greatest caution, if he did not mean to ratify what had been determined on at the interview in Hackettstown. He retained the leases the complainant had sent him, and continued to work the mine, and continued negotiations for a different bargain. He returned the leases on the 27th of May, with suggestions of alterations in them. Meanwhile, the price of pig iron had steadily declined. He kept possession until the 1st of August, having sunk a shaft twenty feet in depth, and sustained a loss, as he said, of about \$2,000 in the working of the mine. The vice-chancellor, I think, rightly held that these acts were referable to the contract mutually agreed upon at Hackettstown; and delivery of possession by a vendor or lessor, accepted and

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acted upon by the vendee or lessee, is such an act of part performance by the former as to take the contract out of the statute of frauds, and to justify a decree of specific performance against the latter. *Earl of Aylesford's Case*, 2 Stra. 783; *Bowers v. Gator*, 4 Ves. 91; *Harris v. Knickerbacker*, 5 Wend. 638; *Brown on Stat. of Frauds* § 471; *Pomeroy on Cont.* §§ 118-124.

Before leaving this subject, it is proper to refer to the fact that the leases forwarded by the complainant to the defendant, at Philadelphia, are not exact transcripts of the lease produced and altered at the Hackettstown interview. The variance was not alluded to in the subsequent negotiations between the parties, nor at the hearing before the vice-chancellor, and seems to have been discovered after this appeal was taken. If attention had been called to this fact in the court below, it might have been explained. At all events, the defendant has suffered no injury therefrom; for the court of chancery decreed the execution of the Hackettstown lease.

Another objection to the decree is endeavored to be rested on the doctrine that the court will not decree specific performance of a continuing contract. There is a class of special and exceptional contracts in which courts of equity refuse to exercise jurisdiction by way of specific performance. These are contracts having such terms and provisions that the court could not carry into effect its decree without some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, to build or carry on railways, mines and the like. In such cases, the court declines to interfere, because of its inability to give relief by one decree. *Pomeroy on Cont.* §§ 307-312. The effort to range this case within this exceptional class of contracts is futile. The court can grant full relief at once, by a decree that the lease be executed, leaving the complainant to his legal remedy thereafter, for breaches of the covenants contained in it. Lord Cranworth, in *Blackett v. Bates*, L. R. (1 Ch. App.) 117, points out the distinction between cases such as that now in hand, and cases of the class in which the court will not entertain jurisdiction.

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in that case, the controversy had been referred to an arbitrator. He had awarded that the defendant should execute to the plaintiff a lease of the right to use a certain part of a railway; but the lease he directed to be executed did not provide for such privileges. The court refused to decree performance of the award, for the reason that by such full relief could not be given to both parties; that the plaintiff would get at once, by the decree, what he sought—whereas, the defendant could not get what he was entitled to, which was a right to enforce performance, by the plaintiff's duties, during the whole term of the lease, and the corresponding means of enforcing such performance. But the lord-justice adds: "If the arbitrator, instead of awarding that the defendant should do certain acts, had awarded that the lease to be made should contain covenants, by the plaintiff, to do them, it would have stood on an entirely different footing. The plaintiff could not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to execute a lease containing certain covenants—a matter of mere relief which is clearly within the jurisdiction of the court and open to no objection." The precedents are decrees directing the execution of mining and farming leases containing stipulations with respect to the mode of cultivating, analogous to the covenants of the plaintiff with respect to the working of the mine and the payment of royalty on the minerals raised. If the defendant is involved in difficulties with respect to past non-performance of his engagements, or in embarrassments in exercising his rights, they will be the consequence of his evading the due performance of his obligations.

The vice-chancellor properly disposed of the agreement between the parties was induced by fraudulent representations with respect to the value of the mine.

The vice-chancellor properly directed

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executed, should bear date on the 6th of March, 1880, when possession was taken. *Pain v. Coombs*, 1 De G. & J. 34; *Rankin v. Lay*, 2 De G. F. & J. 65.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

WILLIAM CRONKRIGHT et al.

v

PETER HAULENBECK et al.

1. In proceedings for partition in equity, the court is authorized in its discretion to make such allowance for the services of the commissioners and their expenses in surveying or otherwise, as may be deemed reasonable on a consideration of the character and extent of the services of the commissioners, and their responsibilities and the expenses reasonably incurred.

2. An appeal will not lie from an order of the chancellor making an allowance to commissioners for their services and expenses in having maps and surveys made, where the ground of appeal is that the allowance was unreasonable and excessive, and the matter has been heard in the court of chancery on petition and affidavits annexed thereto, without any counter affidavits and without application for a hearing on depositions.

On appeal from an order of the chancellor on the following facts.

The bill in this cause was filed for partition of certain real estate in the county of Bergen, of which James Cronkright died seized.

A commission was regularly issued in the cause to Samuel E. De Groot and others, directing them to make partition and division of such lands.

William Williams, the respondent, who is a civil engineer, was employed by the commissioners to make, and he did make, a survey and map of the property for the use of the commis-

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sioners. His bill for such services remaining unpaid, he applied to the court, by petition, for an order directing it to be paid

His petition alleges, and it is not disputed, that his said bill was accepted by the commissioners as just, fair and correct in every particular, and was not paid only because the commissioners had no funds for the purpose.

Upon filing this petition, a rule was granted requiring the complainants and defendants to show cause why the petitioner's bill, with interest, should not be paid by the complainants or defendants, or some of them, and be a lien upon the real estate mentioned in the bill of complaint in the cause, or some part thereof, as proper and legitimate costs in the cause, and execution issue therefor.

This rule was served on all parties, and by a decree dated November 17th, 1879, it was decreed that the petitioner was entitled to said sum of \$513, with interest from November 1st, 1873, to be paid by the complainants, as proper and legitimate costs in the cause.

By another decree, dated October, 1880, the former decree was modified, so that said sum of \$513, with interest, was to be taxed by the clerk as part of the costs of partition, and the complainant's costs, including this bill of William Williams, with interest and costs, to be apportioned between the tenants in common, according to their respective interests, and to be a lien on each share till paid.

A final decree was made herein, June 2d, 1880, also directing the costs to be paid, and making an extra allowance of \$30 to each of the commissioners.

The appellants appeal from so much of the decree of November 17th, 1879, as adjudges that the respondent is entitled to said sum of \$513 and interest for his services in surveying and making maps for the commissioners.

And from that part of the decree dated October, 1880, which orders the amount due William Williams to be taxed as part of the costs in the cause, and orders such costs to be apportioned among the tenants in common according to their respective interests, to be a lien on each share until paid. And from so

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V. The only difference between the decree of November 17th 1879, and that of October, 1880, is that, by the former, the complainant is liable in the first instance to pay Williams's bill and by the latter each owner of the land is responsible for his *pro rata* share of said bill, which is in accordance with the final decree of June 2d, 1880.

The opinion of the court was delivered by

DEPUE, J.

This appeal was taken from an order of the chancellor in the taxation of the costs and expenses in partition, making an allowance to the commissioners of extra compensation for their services, and for the services of a surveyor in making maps and surveys.

The act concerning partition provides for the allowance to each commissioner of \$1.50 for each day employed in the service, together with all actual expenses for surveying, chair bearing assistants, and other necessary expenses, and such further reasonable allowance as the court may judge proper, to be taxed by the court. *Rev. p. 806 § 45.* This act applies in terms only to proceedings for partition conducted under its provisions. But its directions with respect to the allowance of commissioners' fees and expenses, have been adopted in proceedings for partition in equity, and the court is authorized in its discretion to make such allowance for the services of the commissioners and their expenses in surveying or otherwise as may be deemed reasonable, on a consideration of the character and extent of the services of the commissioners and their responsibilities, and the expenses reasonably incurred. *Coles v. Coles, Beas. 365.*

The complaint on the present appeal is that the allowance made were unreasonable and excessive in amount—out of proportion to the services rendered.

The amount of allowances of this kind is usually ascertained in an informal manner, from an inspection of the papers, and statement of counsel, and such knowledge on the subject as the

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court has obtained in its supervision over the proceeding in its several stages. In this case the allowance of the surveyor's charges (which is the principal ground of complaint) was made on his petition and on affidavits, among which was the affidavit of one of the commissioners to the employment of the surveyor and the rendition of the services he charges for, and certifying to the correctness of his bill. No counter-affidavits were offered, nor was any application made to the chancellor for a hearing on depositions.

With respect to the propriety of the allowance to the commissioners for their services, we have no information except the direction in the decree that in taxing the costs of partition there be allowed to the commissioners, as an extra allowance, \$30 each.

I think that from a discretionary order made under such circumstances no appeal will lie.

The appeal should be dismissed.

Appeal unanimously dismissed.

THE NEW YORK AND GREENWOOD LAKE RAILWAY
COMPANY, appellants,

v.

THE HEIRS OF HENRY STANLEY, deceased, respondents.

The owners of lands over which the Montclair Railway Company proposed to construct its railroad, entered into an agreement for the occupation and use of their lands, in consideration of the company building a depot on the premises and certain arrangements for the running of trains. The company took possession and built its railroad in 1870, but neglected to build the depot. It became insolvent, and its property and franchises were sold under foreclosure in 1875. In 1878 the same property and franchises were again sold to purchasers, who organized under the general railroad law in the corporate

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name of the New York and Greenwood Lake Railway Company. On an ejectment against the latter company, brought by the land owners to recover possession of the land, a bill was filed to stay the prosecution of the suit.—*Held*,

1. That the complainants' right to equitable relief arose out of the equities subsisting between the Montclair Railway Company and the land-owners—possession taken by that company under an agreement which has not been carried out, and the expenditure of money on the faith of that agreement in the construction of a railroad over the premises.

2. That the complainant had only a right to equitable protection against the legal title of the plaintiffs in the ejectment suit, to the same extent and upon the same terms as the Montclair Railway Company would have been entitled to such protection.

3. That the terms on which the complainant is entitled to equitable relief are that the complainant shall pay the value of the land and damages as of the time when the Montclair Railway Company took possession, and interest on such valuation from that time.

4. Paying interest on the value of the land and the damages from the time of the original entry is not paying the debt of the defunct corporation; it is only making the recompense which the land-owners are entitled to have on the enforcement of an equity against them.

5. The expense of making and maintaining additional fences made necessary by the construction of a railroad through the premises, should be included in the damages to be awarded for the lands, where the expense thereof falls upon the land-owner

On appeal from a decree of the chancellor, whose opinion is reported in *New York and Greenwood Lake R. R. Co. v. Stanley*, 7 *Stew. Eq.* 55.

On the 22d of February, 1870, the following agreement was entered into between the Montclair Railway Company and the heirs of Henry Stanley, deceased :.

“ In consideration of the sum of one dollar to us in hand paid by the Montclair Railway Company, and in further consideration of the benefit to us of the location of a railway depot thereon, we, John G. Stanley, of the township of Caldwell, and William B. Stanley, of the township of Belleville, in the county of Essex, Richard Speer, and Ellen, his wife, of Morristown, in the county of Morris, Austin L. Stanley, of the township of Wayne, James C. Stanley, Thomas B. Stanley, Elizabeth C. Stanley, John H. Stanley, Cornelius N. Stanley and Julia Stanley, of the township of Little Falls, county of Passaic, state of New Jersey, covenant and agree that we will grant, convey,

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ease to said company, by a good and sufficient warrantee deed, upon said therefor the sum of one dollar, and for the foregoing consideration, tract or parcel of land situated in the township of Little Falls and of Passaic and state of New Jersey, bounded northeast by lands of Edward Francisco, southwest by lands of Joseph S. Bowden, northwest and east by lines parallel to and distant fifty feet at right angles from the centre line of the railway of said company, containing two and one-eighths of land, also an additional width of fifty feet on each side of said tract extending northwestwardly to lands of Edward Francisco, and lands of Edward and Cornelius N. Stanley, from a highway to be laid out across our said land of said Francisco, from the Peckman river to the bridge road. Said company to make a lawful fence on each side of said land and maintain the same. Said deed to be upon the condition that the said company shall build a depot within two hundred feet from said highway to be opened by or as soon as said railway shall be in operation to the Hudson river, or to any line connecting with the Hudson river, and shall maintain the same for ever thereafter.

And upon the further conditions that said railway shall be begun within two years from this date, and completed so as to be in operation within two years thereafter; all wood and timber on said lands to be cut and reserved by said company shall stop not less than four passenger trains daily, each except Sundays, at said depot, provided that so many are run over said road for way passengers. And we further agree that said company may enter upon our said lands, and commence the work of construction before the conveyance may be executed, they doing no unnecessary damage. And further agreed that if the above conditions are not complied with by the railway company, that this agreement holds said company to all damages not complied with as above specified."

Under this agreement the company at once took possession and constructed its railroad on the premises, and it and the corporations which have succeeded to its franchises and property have ever since been in possession and use of the premises, as if their railroad. None of them has performed the conditions named in the agreement.

This bill was filed by the appellants to enjoin the prosecution of an action of ejectment brought against them to recover possession of the premises. From the chancellor's decree giving the complainants relief, but not such as they sought, they have taken this appeal.

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Mr. Cortlandt Parker and *Mr. R. Wayne Parker*, for appellants.

Mr. Benj. C. Potts, and *Mr. Wm. P. Williams* of New York, for respondents, cited :

Indiana Central R. R. Co. v. Hunter, 8 Ind. 74; *Parks v. City of Boston*, 15 Pick. 198; *Vanblarcum v. State*, 7 Blackf. 209; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Lewton v. D. X. & B. R. R. Co.*, 20 Ohio St. 401; *Gilman v. Sheboygan and Fond du Lac R. R. Co.*, 37 Wis. 317; *White v. Nashville and N. W. R. R. Co.*, 7 Tenn. 518; *Aiken v. Albany, Vt. and Canada R. R. Co.*, 26 Barb. 289.

The opinion of the court was delivered by

DEPUE, J.

Whether the agreement between the respondents and the Montclair Railroad Company, of February 22d, 1870, was a valid agreement, is not raised by this appeal. The parties seem to have abandoned or repudiated the agreement. The chancellor held that the circumstances would not warrant a decree of specific performance, and, therefore, refused to make such a decree. From his judicial action in that respect no appeal has been taken.

Nor does the question arise whether the appellants might not have abandoned all rights in the premises which they succeeded to, as the representatives of the Montclair Railway Company, and have proceeded *de novo* to condemn the respondents' lands, in their new corporate name. Under section 57 of the general railroad act (*Rev. p. 917*,) it is possible that in such condemnation proceedings—the respondents' title being in that event divested by the proceedings to condemn—the measure of the land-owners' compensation would be the value of the land at the date of the report of the commissioners, and interest from that time. *Metter v. E. & A. R. R. Co.*, 8 Vr. 222. No proceedings to condemn have been commenced.

Immediately after the agreement was made between the Montclair Railway Company and the Stanleys, the company entered

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into possession and constructed its railroad upon the premises. On the 1st of September, 1870, the company executed and delivered a mortgage on its road and franchises. On November 17th, 1873, a bill of foreclosure was filed, in which proceeding a sale was effected on the 25th of September, 1875. The purchasers organized in the corporate name of the Montclair and Greenwood Lake Railway Company, by articles of association filed October 2d, 1875. The last-named company again mortgaged the railroad and franchises, and on foreclosure of such mortgage, its property and franchises were sold, in October, 1878, and the purchasers at that sale, on the 30th of October 1878, organized as a corporation, under the present corporate name. These several corporations and their receivers, in the intermediate stages of insolvency, have been in the possession and use of the track laid over the respondents' lands ever since the railroad was constructed on it. The respondents began their ejectment suit in 1879.

The bill sets out the agreement between the Montclair Railway Company and the Stanleys; possession taken of the premises under it; the construction of a railroad upon it, and the continued use thereof, and the injury which would result to the appellants if they were ejected from the property. It contains an offer to perform the agreement of 1870, or to pay the value of the right of way over the respondents' lands and for the use thereof since the appellants have been in possession, as might be deemed equitable, and prays an injunction staying the ejectment suit.

It is apparent that the appellants' right to equitable relief arises out of equities which subsisted between the Montclair Railway Company and the respondents—possession taken by that company under an agreement which has not been carried out, and the expenditure of money on the faith of that agreement, in the construction of a railroad over the premises. On no other hypothesis would the appellants have a standing in court to stay the respondents in the pursuit of their legal remedy. This was the view entertained by the chancellor, upon which his decree was founded. He held that the appellants had

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only a right to equitable protection against the respondents' legal title to the same extent and on the same terms as the Montclair Railway Company would have been entitled to such protection, and ordered a reference to ascertain the value of the land and damages as of the time when the land was taken possession of by the Montclair Railway Company, and the allowance of interest on such valuation from that time.

The chancellor's decree conforms to the rule which would have been the correct rule for ascertaining the respondents' compensation for their lands if a bill had been filed by the Montclair Railway Company for the same relief as is sought in this case. *N. H. C. R. R. Co v. Booraem*, 1 *Stew. Eq.* 450. And I think it was correctly applied as against the appellants. The foreclosure and sale of the company's property and franchises under the mortgage did not divest the land-owners' right to compensation for their land, and they are entitled to such compensation from the purchasers at the sale, though the purchasers are created a new corporation; and interest from the time the lands are occupied is part of the compensation which is recoverable in such a proceeding. *Drury v. Midland R. R. Co.*, 127 *Mass.* 571; *Western Pa. R. R. Co. v. Johnston*, 59 *Pa. St.* 290; *Gilman v. Sheboygan R. R. Co.*, 37 *Wis.* 317; *Dayton X. & D. B. R. R. Co. v. Lewton*, 20 *Ohio St.* 401.

Trenton Water Power Co. v. Chambers, reported in 1 *Stock* 471, and again in 2 *Beas.* 199, is a precedent in point. An examination of the original papers and records discloses the legal similarity of that precedent with the case now in hand. The Trenton Delaware Falls Company was incorporated in 1831, with the usual powers of condemnation. It constructed its race-way over lands of Chambers, by his consent. Afterwards, in 1843, the company became insolvent, and receivers were appointed to take charge of the company's property as an insolvent corporation. On the 15th of February, 1844, an act was passed authorizing the receiver to sell the real estate, franchises and works of the company, clear of all encumbrances, and further providing that the purchasers thereof should hold said works, franchises and real estate as a joint stock company under

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Corporate name of the Trenton Water Power Company, in the same manner as the original stockholders held the same. See *of 1844 p. 85*. The property was sold on the 20th of January, 1844, and a new company was organized on the 2d of June, 1844. Chambers, not having been paid for his lands, in 1849 brought an action of trespass against the new corpora-

The company filed a bill in equity to restrain the suit at

In the bill it was averred that Chambers was not entitled to receive compensation for his lands from the new company; he should seek his redress against the original company.

The claim on the part of the company was overruled by the Chancellor, and it was ordered and decreed that the complainant should pay the value of the land at the time it was taken, and all damages sustained by reason of the taking thereof, together with interest on the said value of the said land, and said damages, from the time of taking of said land." Under the order of reference, the master estimated the value of the lands as of February, 1832, when the survey of the canal over the premises was made, and added interest thereon from that time to the time of the making of his report, being twenty-eight years and three months. The master's report was set aside, as erroneous by the report of the case in *2 Beas.*, on the ground that the estimation of the master of the value of the land and damages was greater than was warranted by the evidence, but the Chancellor's directions as to the mode in which the valuation should be made and interest should be computed, were not set aside or disputed.

The rule adopted in *Chambers v. Trenton Water Power Co.*, in respect to the time as of which the value of the land is to be determined, and from which interest is to be calculated, was stated as the general rule by this court in *North Hudson R. R. v. Booræm*, and is in conformity with the decisions in other cases in cases where the original company's property and franchises had been transferred by a judicial sale to purchasers who, by legislative act, became a new corporation. *Drury v. Drury and Co.*; *Western Pa. R. R. Co. v. Johnston*, *supra*. It is, furthermore, a rule which is the necessary result of the doctrine

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that a land-owner consenting to the occupation of his lands for a railroad before his compensation is ascertained, shall be allowed compensation on the basis of the value of his lands at the time when the entry was made, excluding the value of the structure subsequently put upon them by the company. If the appellants are entitled to take the lands now, on a valuation which shall be referable to the time when the appellants took possession, either as to value or the interest thereon, the entry of the appellants must be considered a new taking; and for such a taking the value of the lands, with the road-bed and structure, would represent the respondents' damages for property of which they had, by such entry, been divested. The appellants cannot succeed to the advantage of having the road-bed and structure excluded from the valuation of the property taken, unless they assume the place of the Montclair Railway Company with respect to the circumstances under which that company entered into possession. Succeeding to an equity of the Montclair Railway Company, arising out of its entry of the premises, the appellants take the rights of their predecessors *cum onere*, subject to the obligation to render to the respondents the same equity which the Montclair Railway Company would have been required to render, if that company were making an effort to maintain possession. Paying interest on the value of the land, and damages from the date of the original entry, is not paying the debt of the defunct corporation; it is making the recompense which the respondents are equitably entitled to on the enforcement of an equity against them.

The chancellor directed the master to allow the cost of a fence erected by the respondents, with interest from the time it was erected. The expense of making and maintaining additional fences made necessary by the construction of the railroad, should be included in the damages to be awarded for the lands, where the expense thereof falls, as in the present instance, upon the land-owner. *Pierce on Railroads* 214; *Mills on Em. Domain* § 212; *Readington v. Dilley*, 4 Zab. 209. Any obscurity in the decree with respect to the mode in which the expense of fencing

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should be estimated, can be corrected by application to the chancellor.

Decree unanimously affirmed.

THE JERSEY CITY INSURANCE COMPANY, appellant,

v.

CATHARINE NICHOL et al., respondents.

1. Where there are two policies of fire insurance on the same property, each containing the condition that if the assured shall have, or shall thereafter make, any other *insurance* on the property, without the consent of the company written thereon, then the policy shall be void, the second policy, without such consent, does not invalidate the first, for it never effected an insurance.

2. Although there is a second policy, there is no fraud in the statement, in proof of loss, that there is no other insurance, if the second policy was never effected.

3. A statement of the value of the house burned, in proving the loss, without actual fraud appearing, is but an estimate and opinion, which, if excessive, will not invalidate the insurance for false swearing.

4. A claim for loss under the second policy, after the fire, made by the insured, has no effect in reviving that policy, if the insurer does not assent thereto, or waive the forfeiture.

5. Where an apportionment of the loss is provided for in a policy, this can only be construed to apply to other insurance valid in its inception.

On appeal from a decree of the chancellor, based on the following opinion of Barker Gummere, esq., sitting as advisory master:

On March 5th, 1874, the complainant issued a policy of insurance to the defendant, Catharine Nichol, then Catharine Mettenheimer, insuring her dwelling-house in Oxford, Warren county, against loss or damage by fire, to the amount of \$1,200, for the term of five years, from February 19th, 1874. The policy contained a condition that "if the assured * * *

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shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of this company written hereon, * * * then, and in every such case, this policy shall be void ;” and also a further condition, that “in case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the solvency or liability of the other insurers ;” and a further condition requiring the assured to deliver under oath to the company, in case of a loss by fire, an account of such loss, “stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon ;” and a further condition that “all fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.”

On October 28th, 1878, the defendant, Catharine Nichol, procured from the Millville Mutual Marine and Fire Insurance Company a policy, purporting to insure the same premises against loss or damage by fire, to the amount of \$800, but subject to the following condition : that “if the assured shall have * * * any other insurance on the property hereby insured, or any part thereof, without the consent of this company written hereon, * * * then, and in every such case, this policy shall be void.” No consent to the then existing insurance on this property, made by the complainant, is written on this instrument. The agents of the Millville company, at the time the policy was procured, reported to the company that there was no other insurance on the property, and there is no proof that either the company or its agents had any knowledge of the prior insurance thereon made by the complainant ; nor is there any proof that the Millville company or its agents have at any time waived a forfeiture under the above-stated condition of its policy.

On or about February 7th, 1879, the dwelling in question was destroyed by fire, and on February 14th, 1879, the defendant, Catharine Nichol, made proof to the complainant of the

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but neither in such proof nor otherwise, did she or her
 ey, Mr. Morrow, disclose the fact that she had procured
 foresaid policy from the Millville company, nor did she
 h it a copy of the written portion of said policy; and in
 oof of loss, and in a subsequent conversation with com-
 nt's officers, before the payment of the loss, she stated that
 was no other insurance on the property, and that she had
 plied for any.

May 8th, 1879, the complainant, being wholly ignorant of
 et of the procurement of said policy, paid to the attorney, Mr.
 ow (who knew the fact of such procurement, and also of
 gnorance on the part of the complainant), the sum of \$900,
 d for the loss sustained by the defendant, Nichol, by said
 nd in discharge of its liability under the first-mentioned

e defendant, Morrow, still holds in his possession the sum
 00, part of said sum of \$900.

June, 1879, the defendant presented to the Millville com-
 proofs of the loss occasioned by the said fire, and claimed
 ent of the loss, under the policy she had procured from
 company; and in the said proofs she did not disclose to the
 ille company the prior insurance made by the Jersey City
 any, or the payment of the loss by it.

July 3d, 1879, the Millville company informed the Jersey
 company that the defendant, Catharine Nichol, had pro-
 a policy from it before the fire occurred, and had pre-
 l to it a claim for a total loss.

a bill charges that the procurement of the policy from the
 ille company by Catharine Nichol, without the consent
 o of the Jersey City company written upon its policy,
 ed the policy of the latter company, and that it was void
 l before the occurrence of the fire; that said Nichol falsely
 raudulently stated in her proofs of loss that she had no
 insurance, and falsely and fraudulently stated to the officers
 e Jersey City company, while her claim was pending, that
 ad not applied for any other insurance, and that such false
 raudulent statements forfeited her claim under said policy;

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that the company was induced to pay the said \$900 by such false statements, and paid the same in ignorance of the fact of the procurement of said policy from the Millville company, and that the defendant, Morrow, received said sum, knowing that such policy had been procured, and that the complainant was ignorant thereof at the time of such payment. It prays a decree that Morrow repay the \$500 remaining in his hands, and that Catharine Nichol repay the residue of the \$900, with interest on the whole sum from the date of payment.

I find and determine as follows, to wit:

1. That the first condition set forth in the policy issued by the complainant restricts the rights of the insured party, and is to be strictly construed; and that, as a breach of the condition operates as a forfeiture, the condition must be construed in conformity with the exact words thereof. *State Ins. Co. v. Maackens*, 9 Vr. 57. The counsel for the complainant contends that the words "she hereafter make other insurance" &c., should be construed to mean "shall hereafter attempt to make other insurance," "shall hereafter procure any policy of insurance whatever, valid or void." The exact words used, and none others, are to be construed, and according to their strict meaning. To constitute a breach of this condition, it must appear that Catharine Nichol made an insurance upon this property, under a contract valid and operative in law at the time of its execution and for so long an appreciable time thereafter. Unless the contract to insure were valid and effectual in law at its execution, there would not, in fact, be an insurance. The condition must be construed to mean an actual valid insurance.

2. That neither the sixth condition set forth in said policy, nor the eighth condition thereof, can be resorted to for the purpose of enlarging the strict terms of the forfeiture created by the first condition, and that, if resorted to, they are to be strictly construed, and that, when so construed, they must be intended to mean "actual valid insurance," by "insurers bound by a valid contract," and by "policies creating an actual insurance thereon."

3. That the policy procured by the defendant, Catharine Nichol, from the Millville Mutual Marine and Fire Insurance

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Company, did not effect an insurance upon the property insured by the complainant's policy; the testimony on the part of the complainant establishes that the policy is declared upon its face to be void, if there were other existing insurance on the property without the consent of the company written on the policy; that there was such other insurance existing at the execution of that policy, and that the company's consent thereto was not written on the policy.

The policy procured from the Millville company was therefore void. *Schenck v. Insurance Co.*, 4 Zab. 454; 6 Cush. 342; 23 Pick. 423; 118 Mass. 465; 119 Mass. 121; 41 N. H. 170; 55 N. H. 65; 65 Me. 368; 20 Ind. 520; 26 Ohio St. 664; 2 Watts & Serg. 506; 51 Pa. St. 402. The policy was not voidable only; it was absolutely void. The contract of insurance never took effect. It was to take effect, provided (1) that there was no other existing insurance, or (2) that a consent in writing be written on the policy to such other insurance, if existing. These were conditions precedent to the contract, the fulfillment of which was essential to give the contract vitality on the part of the company. Neither was fulfilled, and the contract did not become effectual.

Nor is any proof adduced tending to show a waiver of the conditions, and that it was thereby vitalized.

4. That no insurance was made on the property insured under complainant's policy subsequent to the execution thereof, and that there was no breach of the said first condition in this respect.

5. That the sworn statement of Catharine Nichol, in her proofs of loss made to the complainant, that there was no other insurance on the property, was neither fraud nor attempt at fraud upon the complainant in contemplation of law, and did not impair any legal right of the complainant. Nor were her statements to its officers that she had not applied for other insurance, fraudulent in contemplation of law. They were not material, and did not affect the complainant's legal obligation under its policy.

6. That the payment of \$900 by the complainant was made in the discharge of its then legal obligation, and that such obli-

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gation was not affected by its ignorance of the procurement of the policy from the Millville company, or by the concealment of that fact by Catharine Nichol or her attorney.

And I respectfully advise the chancellor that the injunction issued in the cause be dissolved, and that the bill be dismissed; and that, under the peculiar circumstances of the case, costs be not allowed to either party as against the other.

The bill was filed to obtain from the defendant, Catharine Nichol, and her agent, William H. Morrow, the repayment of \$900 which had been paid to them on an adjustment of the loss and damage by the burning of her dwelling-house, in Oxford, N. J., insured by the complainants.

The grounds of relief stated in the bill are, that after the date of the policy of insurance, issued to her before her marriage, by the name of Catharine Mettenheimer, February 19th, 1874, for five years, in the sum of \$1,200, she obtained another policy of insurance from the Millville Mutual Insurance Company, October 28th, 1878, for \$800, without the consent of the complainants written thereon; and that after the loss, in making her proofs, she swore that there was no other insurance on the building; that they had no knowledge of other insurance until after payment of the loss; and that no consent was given or written on their policy.

The building insured was burned February 7th, 1879, with the time named by both policies, and was a total loss.

On filing the bill and affidavits a preliminary injunction was issued, restraining the defendants from parting with the \$900 paid for damages, or any part thereof then remaining in their hands. At the final hearing this injunction was dissolved, and the bill dismissed—hence this appeal.

Mr. Flavel McGee, for appellant, cited:

Dewees v. Manhattan Ins. Co., 5 Vr. 244; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Pet. 495; *Bigler v. N. Y. Central Ins. Co.*, N. Y. 402; *Suggs v. Liverpool and London and Globe Ins. Co.*, Ins. Law Jour. 657, Ky. Ct. App.; *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250; *David v. Hartford Ins. Co.*, 13 Iowa 69.

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Mr. Wm. H. Morrow, for respondent.

The same rule which applies to all other instruments, applies equally to a policy of assurance, viz., that it is to be construed according to its sense and meaning as collected in the first view from the terms used in it, which terms are to be understood in their plain, ordinary and popular sense. *Selwyn's N. P.* 889; *Pertson v. French*, 4 *East* 135; *Hunter v. Leathe*, 10 *B. & C.* 71.

All conditions, exceptions or agreements looking to a forfeiture are to be construed most strongly against the party in whose favor they are made. *Ins. Co. v. Maackens*, 9 *Vr.* 572; *Carter v. Ins. Co.*, 14 *Id.* 304; *Jackson v. Ins. Co.*, 23 *Pick.* 418; *Le v. Ins. Co.*, 6 *Cush.* 343; *Jackson v. Ins. Co.*, 5 *Gray* 118; *Bardwell v. Ins. Co.*, 118 *Mass.* 465; *Thomas v. Ins. Co.*, 121 *Mass.* 121; *Gale v. Ins. Co.*, 41 *N. H.* 170; *Gee v. Ins. Co.*, 55 *N. H.* 65; *Rising Sun Ins. Co. v. Slaughter*, 20 *Ind.* 520; *Co. v. Schettler*, 38 *Ill.* 166; *Knight v. Ins. Co.*, 26 *Ohio* 54; *Mitchell v. Ins. Co.*, 51 *Pa. St.* 402; *Stacey v. Ins. Co.*, 51 *Pa. St.* 506; *Hardy v. Ins. Co.*, 4 *Allen* 221; *Phillips v. Ins. Co.*, 37 *Me.* 137; *Lindley v. Ins. Co.*, 65 *Me.* 368; *Black v. Mercer Ins. Co.*, 4 *Zab.* 447; *Carter v. Boehm*, 3 *W. R.* 1905-9.

In *33 Iowa* 331, the insurance mentioned in the subsequent policies had been paid.

In *Bigler v. Ins. Co.*, 22 *N. Y.* 402, suit was brought on the first policy, which was defeated on the ground that it was superseded by a subsequent policy, which was shown to be valid by the judgment in favor of the assured, and that a draft had been issued in its payment.

In *Lackey v. Ins. Co.*, 42 *Ga.* 457, the court says: "The question here turns not so much upon the contract as upon our interpretation of the law; and this law would make void the first policy, though no objection was said about it in the second policy." The case turned, the court said, rather on the law than on the contract.

In *Carpenter v. Ins. Co.*, 16 *Pet.* 497, suit was brought by the assured to enforce a subsequent policy which he had effected

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with another company, and which was resisted by the company on the ground that by the terms of the policy it was void, because, at the time, he had an insurance on the same property in another company, of which he had not notified the defendants; to avoid this defence he alleged that the prior insurance was void because it was procured by misrepresentations of material facts. But the court held that inasmuch as it was treated, at the time the second policy was issued, by all the parties thereto as a subsisting and valid insurance, it must be regarded as a valid policy, until the facts of the alleged false representations were shown.

As to fraudulent or false statements. *Conover v. Wardell*, 7 C. E. Gr. 498; *Story's Eq. Jur.* §§ 195, 203; *Marsh v. Cook*, 5 Stew. Eq. 266-7.

The inquiry here is simply whether there was a valid insurance at the time, and this is not affected by what the plaintiff or the Millville company saw fit to do afterward. These acts can in no way have affected injuriously the defendants, so as to estop the plaintiff from asserting that there was no valid policy issued by the Millville company, nor can they alter the rights of the parties. *Thomas v. Ins. Co.*, 119 Mass. 122; *Bardwell v. Ins. Co.*, 118 Mass. 468; *Hardy v. Ins. Co.*, 4 Allen 226.

It is true the terms of this condition should be construed fairly; and it is but fair to say that they must also be strictly construed. The condition was intended to provide for a forfeiture of the contract of insurance, and a forfeiture should not be declared by construction, when the strict terms of the condition do not require it. *Knight v. Ins. Co.*, 26 Ohio St. 671; *Carson v. Ins. Co.*, 14 Vr. 304.

The opinion of the court was delivered by

SCUDDER, J.

The defence made by the defendants in their answer and proofs is, that the policy obtained by the defendant, Catharine Nichol, in the Millville Insurance Company, after the execution

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and delivery of the complainant's policy, was void, because of a condition appearing on its face, broken at the time it was made, and which has not been waived by any subsequent act of the Millville company. Both policies contain the condition that "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, then this policy shall be void." The Millville policy has no consent to any other policy written thereon, nor is there any proof that they had knowledge of the complainant's policy until after the fire. By the express terms of this second policy it was, therefore, at the time it was executed, void, because at that time there was a policy issued by the complainants to which no consent was given. The condition for consent was a condition precedent to the vitality of the policy, which was broken as soon as it was accepted by the insured, and the policy never could be enforced at any time if loss by fire had been sustained, nor could any action be maintained on it.

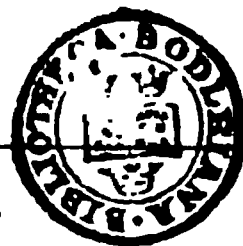
It was different with the complainant's policy, which was valid in its inception, and was only liable to be avoided by some breach of its conditions happening after it was issued and took effect. The principal breach which is claimed, is of the stipulation that if assured shall hereafter make any other insurance on the property thereby insured, without the consent of the company written thereon, this policy shall be void. The exact term used is important, "make other insurance;" not if she shall obtain, or attempt to obtain any other policy of insurance, whether valid or not valid. The difference between a policy and a valid, effectual insurance is here indicated; it is the difference between the instrument and the object sought by it. The rule of interpretation applied to policies of insurance does not admit of any latitude in a construction which will work a forfeiture, and will never be extended beyond the exact words of the policy to reach that result. This rule has been defined in the recent cases of *Carson v. Jersey City Ins. Co.*, 14 Vr. 300, and *State Ins. Co. v. Maackens*, 9 Vr. 564. While, therefore, we are constrained to say that the word "void," in the second

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policy does not mean voidable, or something else than void, although such interpretation works a forfeiture and avoids that instrument, we are also justified in holding that the word "insurance," used in the first policy, is not equivalent to the word "policy," and that the subsequent policy obtained, being no insurance, creates no forfeiture. There can be no other reasonable conclusion; for a contract of insurance is a contract of indemnity, and if there be no indemnity by its terms, and the contract is void, then there is no insurance, though there may be a policy of insurance in form. The call for an insurance, in fact, is not met by the formal execution of a contract for insurance which is defeated as soon as it is made, by one or more of the provisions or conditions contained in it.

This result does not stand on the construction now given, as a first suggestion, for there is express authority in our state which has been approved and followed in our courts for many years. Since the case of *Schenck v. Mercer Co. Ins. Co.*, 4 Zab. 447, decided in 1854, it has been the settled law with us that where there is a condition like the present one in the first policy, it must be made to appear that the second policy is a valid, subsisting contract, and the showing of a policy void when it was issued is not sufficient to defeat the prior insurance. The case cited is directly in point, and will not be overruled when it so clearly appears to be in accordance with the exact rule of construction applicable to such contracts, and when it is also sustained by the weight of authority in other courts. This support will be found in the following cases, and others that might be cited: *Jackson v. Massachusetts Mutual Fire Ins. Co.*, 23 Pick. 418; *Clark v. New England Ins. Co.*, 6 Cush. 342; *Hardy v. Union Ins. Co.*, 4 Allen 217; *Thomas v. Builders Ins. Co.*, 119 Mass. 121; *Stacey v. Franklin Ins. Co.*, 2 Watts & Serg. 506; *Gale v. Belknap Ins. Co.*, 41 N. H. 170; *Philbrook v. New England Ins. Co.*, 37 Me. 137; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St. 402; *Hubbard v. Hartford Ins. Co.*, 33 Iowa 325; *Knight v. Eureka Ins. Co.*, 26 Ohio St 664.

It seems, also, that the examination of this subject by approved text-writers has led them to the same conclusion. May



on *Ins.* 437 ; *Flanders on Fire Ins.* 49, 50 ; 2 *Pars. on Maritime Law* 100 ; *Wood on Fire Ins.* § 348.

The cases most frequently cited in opposition to this doctrine are *Carpenter v. Providence Washington Ins. Co.*, 16 *Pet.* 495 ; *Bigler v. New York Central Ins. Co.*, 22 *N. Y.* 402. In the latter case the second policy was treated by both parties to it as a valid, subsisting insurance, and a draft was given by the company, and accepted by the insured, to pay the amount of the loss ; and in the former, the decision appears to have been put upon the ground that the policy could only be defeated by proof of the extrinsic facts of misrepresentation in obtaining the insurance, which did not render it utterly void *ab initio*, but merely voidable. In that case the court also declined to discuss the cases cited in conflict with the conclusion, and said they were distinguishable from it, and could not be permitted to govern it. These cases and others have been considered in those to which reference has been above made, and it will not be necessary to examine them further, for, notwithstanding the great respect to which they are entitled, their reasoning and authority are not sufficient to overcome the weight of opinion against them which has been approved in our own courts. The latest case to which my attention has been directed is *Landders v. Watertown Ins. Co.*, in the court of appeals of New York, reported in 24 *Alb. Law Jour.* 535 (1881), which appears, from the brief citation there given, to follow the earlier case of *Bigler v. New York Central Ins. Co.* ; but whether distinguishable or not from this case under consideration, it can hardly be allowed to change the opinion already expressed.

As there was no actual, valid insurance in the Millville Insurance Company at the time Mrs. Nichol made the proof of her loss to the complainants, there was no fraud which materially affected them in her statement that she had no other insurance on the property ; nor in her allegation that the actual value of the house insured, at the time of the fire, was \$2,000, as that was an expression of opinion only, and not a misstatement of a fact material to the insurer. Another witness testified that her loss was \$1,200, and the complainants compromised the loss with

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her by the payment of \$900; but neither is sufficient evidence without proof of actual fraud, that her valuation was too great, and intended to defraud the company by false swearing.

After the payment of the loss by complainants, on May 7th, 1879, the defendant, Catharine Nichol, on June 7th, 1879, made her claim and proof of loss against the Millville Insurance Company, on the second policy, above referred to; but this company has not adjusted or paid the loss, or admitted in any way that the policy issued by them is valid. This in no wise affects the complainants, for upon any construction of these policies, the second policy was invalid and inoperative until it should be ratified and revived by some assent to its continuance or waiver of the forfeiture, with knowledge of the fact of a former insurance.

Section 6 of the complainant's policy states that, in case of any other insurance upon the property thereby insured, whether made prior or subsequent to the date of the policy, the assured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum thereby insured bears to the whole amount insured thereon, without reference to the solvency or liability of the other insurers. It is claimed that, under this section, there should be an apportionment of the loss on these policies which have been issued; but this apportionment can only be made where there are other insurers, and as we have above held that the second policy was, in legal effect, no insurance, this section is not applicable to the case here presented.

The decree is affirmed, with costs allowed to the respondent in this court.

Decree unanimously affirmed.

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CHARLES H. MUIRHEID and WILLIAM H. MUIRHEID, appellants,

v.

CHARLES E. SMITH, respondent.

1. In 1866, one M. died seized of a farm of about two hundred acres, leaving a widow and several children. One son, Charles, purchased the interests of his brothers and sisters in the farm, and agreed with one of his brothers, William, that William should remain on and take charge of the farm, and maintain their mother and unmarried sister thereon, from the products of the farm, promising to compensate William for his services, and to convey the farm to him whenever he wished, or could pay for it. The mother remained until her death in 1872, and the sister still resides there, and Charles has spent one or two months of every summer on the farm, with his own family. In March, 1877, he conveyed the farm to William, together with the implements and stock thereon, for a consideration, named in the deed, of \$12,000, for which sum William gave a mortgage on the farm to Charles. In June, 1877, the amount of this mortgage was reduced by crediting thereon a mortgage of \$2,000, which Charles had given to William in 1866 for his interest in the farm, by \$2,000 which Charles allowed William for his services on the farm, and by reducing the valuation of the farm from \$12,000 to \$10,000—leaving the sum secured by the mortgage, \$6,000. In April, 1877, the complainant began a suit in Pennsylvania on Charles's note, in which he recovered a judgment for \$18,000. Charles was insolvent when the farm was transferred, but this was unknown to William. *Held*, that the conveyance was good as against the complainant, and the adequacy and fairness of the consideration, and the *bona fides* of William having been established, the land cannot be deemed as a mere security for the original debt, besides the mortgage for \$6,000 due from Charles to William, and consequently be charged therewith, but the transfer being sustained, the bill to set it aside as fraudulent must be dismissed.

2. To set aside and completely annul a deed made to a grantee who is a creditor, or who has given a consideration for the conveyance, which shall carry with it a forfeiture of all the grantee's rights, on the ground that the conveyance was made in fraud of creditors, it is necessary that it should appear that the grantee had knowledge of, or participated in the fraudulent intent of the grantor.—DEPUE, J.

3. Where a deed is sought to be set aside as voluntary and fraudulent, as against creditors, and the evidence is not sufficient to induce the court to avoid the deed absolutely on the ground of fraud, but is sufficient to excite a

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well-grounded suspicion as to the adequacy of the consideration and the necessity of the transaction, the court will permit the conveyance to stand on security for the consideration actually paid.—DEPUE, J.

On appeal from a decree of the chancellor, whose opinion is reported in *Smith v. Muirheid*, 7 Stew. Eq. 4.

Mr. A. G. Richey and Mr. James Wilson, for appellants, cited :

Clark v. White, 12 Pet. 178; *Beatty v. Fishel*, 100 Mass. 449; *Vanderveer's Will*, 5 C. E. Gr. 463; *Magniac v. Thompson*, 7 Pet. 347; *Kline v. Horine*, 47 Ill. 430; *Merchants Bank v. Northrup*, 7 C. E. Gr. 58; *Atwood v. Impson*, 5 C. E. Gr. 151; *Hildreth v. Sands*, 14 Johns. 493; *Bedell v. Chase*, 34 N. Y. 386; *Wood v. Shaw*, 29 Ill. 444; *Wilson v. Lott*, 5 Fla. 305; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Demarest v. Terhune*, 3 C. E. Gr. 532; *Libby v. Hood*, 3 Mo. 206; *Seymour v. Nelson*, 19 N. Y. 417.

Mr. Barker Gummere, for respondent, cited :

Demarest v. Terhune, 3 C. E. Gr. 533, 534; *Randall v. Vroom*, 3 Stew. Eq. 355; *Miller v. Sauerbier*, 3 Stew. Eq. 73, 74; *Clafin v. Mess*, 3 Stew. Eq. 212; *Poague v. Boyce*, 6 J. J. Marsh. 70; *Lynde v. McGregor*, 13 Allen 213; *Hartman v. Diller*, 62 Pa. St. 37; *Pettibone v. Stevens*, 5 Conn. 19.

The opinion of the court was delivered by

KNAPP, J.

The bill is filed by Smith as a creditor of Charles H. Muirheid, sought in aid of an attachment sued out by Smith against Muirheid, to annul a conveyance of lands made by the debtor to his brother, William H. Muirheid, upon the ground that the transfer was made in fraud of creditors. The cause was heard upon bill, answer and proofs, by the chancellor, who, by his decree, holds the conveyance void for fraud.

The principles involved in the litigation are settled and

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familiar, and are not subjected to controversy. It is their application to the case made, which is questioned in this appeal.

The bill calls for answer not under oath, and defendants both answered, denying the fraud alleged in the bill. The proof taken was entered upon the part of the complainants, William H. Muirheid being examined upon the complainants calling him upon the stand.

It appears from the case that the father of the defendants died intestate, in 1866, seized of a farm of about two hundred acres, at Hopewell, in Mercer county, leaving a widow and seven children and the child of a deceased daughter, his heirs-at-law. Charles being possessed of means, and engaged elsewhere in profitable employment, desired to retain the premises as a home for the family, and especially for his mother and maiden sister, and purchased from the other heirs their shares in the father's property. He arranged with William, his younger brother, to remain in charge of the farm, and to cultivate it for the family subsistence, promising William to compensate him for this service, and to convey the farm to him whenever he desired, or should be able to purchase it. William devoted himself to the management of the farm and the care of the family for a period of ten years. His mother remained with him until her death in December, 1872, and the sister has had her home with him from the time when the arrangement was made until the present. To this family home, Charles also came each year with his family, remaining from one to two months. In March, 1877, Charles sent an executed deed, dated the 16th of that month, to a scrivener at Pennington, conveying to William the farm, with the stock and farming implements thereon belonging to Charles, naming in the deed \$12,000 as the consideration, and directed the draft of a mortgage upon the farm from William to him for that amount. The deed was delivered to William, and the mortgage executed and returned by the scrivener to Charles. No meeting of the parties took place immediately before or at the time of the transfer. At this time William held the bond and mortgage of Charles for \$2,000, the purchase-money on the sale of William's interest as tenant in common in these lands,

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and was, or claimed to be, Charles's creditor for the value of his past services as manager of the homestead. In June following the date of the deed, the parties met at Philadelphia, and settled and adjusted the claims of William by credits upon the purchase-money mortgage, reducing it to a balance of \$6,000. William objected to the price stated in the deed for the farm and other property conveyed, claiming that \$10,000 was the fair value. To this, Charles acceded, and reduced the price to that amount. The mortgage of Charles was paid by a further credit of \$2,000, and for the ten years' services in the management of the farm, \$200 a year was agreed upon as a compensation. For the balance of the mortgage outstanding against William, he has since paid the interest.

The complainant below held the promissory note of Charles H. Muirheid, at the time the property was conveyed, for a large sum of money then three years overdue, upon which suit was commenced in April, 1877, in Philadelphia, resulting in a judgment of over \$18,000. In February, 1879, these lands were attached as the property of Charles for that debt. We may assume that the averment in the bill of the insolvency of Charles at the time, not denied in the answer, is true. But, if true, and William was aware of it, which does not appear, it is not denied that a creditor may purchase from his debtor, although insolvent, to protect his debt, if the purchase be made in good faith, and at a fair valuation. To maintain the decree of the court below, it must appear that the transfer in question was made with the intent of the parties to it to delay, hinder or defraud creditors; or, if not actually fraudulent, a purchase from a debtor in failing circumstances, for such inadequacy of price that it is inequitable as against creditors for the purchaser to retain his bargain.

I am unable to come to the conclusion reached by the learned chancellor, that the circumstances of this transaction prove fraud in the parties to it, or in either of them. I do not discover in it anything suspicious, or regarding the situation of the persons contracting, strange or abnormal. It is true that the conveyance was made to a relative, but that relative was his creditor; and,

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besides, it was in execution of an understanding and purpose of the parties of ten years' standing. The reduction of the price of the farm and stock, as put in the deed by Charles, would, it is said, and perhaps truly, have been an unusual act between strangers. But the condition and relations in which persons dealing are found must be observed and considered in interpreting their acts and conduct. These parties were not strangers, but brethren. The younger was accustomed to defer to the judgment and wishes of the elder. To gain an advantage in dealing was no part of the purpose of either. If they did not bargain sharply and at arm's length, as strangers might, it is sufficient for the validity of their contracts that they dealt in honesty and fairness, and that the debtor did not donate away, in whole or in part, his property from his creditors. Mutual confidence in their commerce and intercourse was to be expected. It was their wont. Charles took upon himself to state the price in the deed. If that price had really been put too high, and the parties became persuaded of the fact, it was but natural for them, and an act of plain justice, to put it at the true value of the property sold. Fraud is out of long range of such an act. Equally natural and just was it that there should be made a settlement and allowance of the claim of William for his ten years of service on the farm under his brother's employment, if it be true that there existed such an agreement—and the proof of it I do not doubt. The correctness of the credit of the mortgage debt cannot be the subject of cavil. For the balance, William's bond and mortgage remains outstanding upon interest.

The testimony of William, that he assumed charge of the farm for the support of the family, on an agreement to be paid a compensation by Charles for the service, stands uncontradicted by any fact, circumstance or witness in the case. The service he performed with fidelity, and it does not appear that, beyond his mere living, there was a dollar of gain to him, other than the promised compensation, resulting, by their settlement, at less than the pay of a common laborer. That he allowed the promised reward to remain unpaid for ten years, unusual as it might be between ordinary master and servant, was, in view of the

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ultimate purchase by William as arranged for, no startling novelty.

Nor am I able to perceive how a failure of these parties to make an inventory of the personal chattels conveyed with the farm, is an indication of fraud. The character and amount of the chattels were well known to each. The items were not numerous, and the whole was chiefly valuable in connection with the farm. An accurate estimate of the gross value would see not to be at all difficult, and to persons not seeking to create appearances, such an inventory would be purposeless.

The complainant attacked, by his proof, the fairness and honesty of the reduction made in the price of the property conveyed. The attempt was to show that that price was so far beneath the true value as to evince a fraudulent motive of the parties to cover the debtor's property. Several witnesses competent to speak of the value of lands in the neighborhood, were put upon the stand by the complainant to prove the alleged inadequacy. It is entirely clear, I think, that the testimony, so far from impeaching the honesty of the agreed price, fully establishes it. The range of their estimates of the farm, increased by the proved value of the personalty (a little less than \$1,000), goes above and falls below the sum agreed upon—the average differs not essentially from it. The fair inference from this testimony is that the property conveyed could not, at the date of the deed or since, have been sold to another purchaser for that amount.

As a further badge of fraud, it is urged that if the conveyance was not made *pending the suit*, it was executed when suit was threatened by complainant. His claim had existed and been due for three years, and the only evidence that suit was threatened at the time, is found in the fact that suit was begun in Pennsylvania about three weeks after the conveyance was made, and in New Jersey two years later.

To impeach a conveyance on the ground that it was designed to hinder, delay or defraud creditors, it is necessary, not only that the vendor acts from such motive, but it is essential that the vendee shall concur in or have cognizance of the fraudulent purpose. *Merchants Bank v. Northrup*, 7 C. E. Gr. 58; *At-*

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wood v. Impson, 5 C. E. Gr. 151; *Hildreth v. Lands*, 14 Johns. Ch. 493; *Magniac v. Thompson*, 7 Pet. 347. Now, whatever the design of Charles may have been in this transaction, to invalidate the deed on this ground, facts should have been established in proof to show or to justify the unequivocal inference that William participated in or had notice of such a design in accepting this grant. The learned judge who tried this cause conceived that there was such evidence in the case, hence the decree made by him; but on a careful examination of the evidence, I have been unable to find ground for a reasonable conjecture, even, that William participated in or was cognizant of any such unlawful purpose, if it existed. I see no reason whatever to doubt the truth of William's statement that he did not know that any debts were pressing Charles, or that he was indebted in any wise to the complainant, or that he was, before the filing of this bill, ignorant of the very existence of the complainant.

Astute as courts should be in the detection of fraud, they are not justified in finding it on grounds which show no more than its possible existence. When the acts of parties admit of a reasonable interpretation in favor of honesty and fair dealing, they should receive it.

I have failed to discover, in this case, any fact or circumstance which is not capable of a reasonable interpretation consistent with the entire good faith of William in this transaction. I think the consideration paid was legitimate and legal. William was the creditor of Charles, and they had a right to deal together in the adjustment of the debt, if the transactions were *bona fide*, and its good faith, so far, at least, as William is concerned, is, as I think, put beyond reasonable doubt.

But conceding the failure in the proof to establish actual fraud as against William, it is still contended that the conveyance ought not to stand, because the consideration for which it was made was so inadequate that it is, under the circumstances, inequitable that William should hold on to his bargain. In this court, in *Demarest v. Terhune*, 3 C. E. Gr. 532, a conveyance of lands by a debtor in failing circumstances to a creditor, in

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payment of a debt due him, the amount of such debt appearing to be an inadequate price, the conveyance was held to be voluntary as to such excess of value, therefore constructively fraudulent against creditors, and was allowed to stand only as security of the grantee's debt, a doubt existing as to the *bona fides* of the transaction, the burthen of proving which was held to be upon the creditor. Inadequacy of consideration and doubt as to the *bona fides* of the conveyance for other purposes than as security of a debt, were the essential features of that case. The principles ruling in it, if applied to this case, would result in a modification of the decree made below, which would charge upon the lands the entire debt due from Charles to William, and not the mortgage only. But if the claim adjusted between William and Charles, for services, be recognized as rightly allowed, the proof, as I have already remarked, fails to show any inadequacy of price, and it cannot be said that the conveyance was to any extent voluntary. As to the sufficiency of the proof of that claim, we have the promise to pay a compensation for the services performed, and an adjustment between the parties of the value of those services. The nature and extent of the services are not left in doubt; he became the servant of his brother to work his farm, and out of it to provide for the support of his mother and sister; he devoted the best years of his life to this duty. The parties agreed as to its value, and the complainant does not, by any proof, attempt to deny the fact of its performance, or question the fairness of the adjusted amount.

I am unwilling to disturb this conveyance for any reason alleged against it. I think the bill should have been dismissed and shall vote to reverse the decree, and order the bill dismissed.

The following opinion was delivered by

DEPUE, J.

The deed from Charles to William was executed on the 15 of March, 1877, acknowledged March 19th, and recorded April 3d.

The price of the property conveyed was not agreed upon even discussed between the parties before the deed was executed.

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and delivered. In June, three months after the deed was executed, and two months after it was recorded, the parties got together for a settlement. At this interview the price of the property was reduced to \$10,000, and William was allowed \$2,000 for his services in managing the farm. Those sums, together with \$2,000, which represented William's interest in the mortgage given by Charles to him and his sister, in 1866, were credited on the \$12,000 mortgage, leaving \$6,000 the balance due on it. The mortgage was subsequently assigned to Margaret E. Rhodes.

I think it is clear that the conveyance was made by Charles in pursuance of an understanding between the brothers, which had existed for many years. Charles had bought the homestead in 1866, shortly after his father's death, in order to provide a home for his mother and his sister Sarah, and an arrangement was made that William should remain on the farm and cultivate and manage it, and should be permitted to become the owner of it at some future time, when it suited the convenience of all parties.

I think it also clear that there was a general understanding that William was in some way to be compensated for his services in remaining on the farm and managing it as a home for the family.

In the absence of the claims of the creditors of Charles, the conveyance to William, in March, 1877, was a thing eminently fit and proper to be done.

I agree with the opinion of Judge Knapp, that the evidence is not sufficient to sustain a decree setting aside the conveyance entirely, as a conveyance made in fraud of creditors, for to set aside and completely annul a deed made to a grantee, who is a creditor, or who has given a consideration for the conveyance, which shall carry with it a forfeiture of all the grantee's rights, it is necessary that it should appear that the grantee had knowledge of, or participated in the fraudulent intent of the grantor. *Atwood v. Impson*, 5 C. E. Gr. 151; *Merchants National Bank v. Northrup*, 7 Id. 58; S. C., 8 Id. 582; *Magniac v. Thompson*, 7 Pet. 348.

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But I do not agree to the relief proposed in the opinion read.

The circumstances connected with the execution and delivery of the deed, and the settlement of July, cast a cloud of suspicion over the transaction. While the evidence has relieved William from the imputation that he knowingly engaged in a scheme for the disposition of this property in fraud of the creditors of his brother, the fairness of the transaction, so far as concerns the conduct of Charles, in dealing with his property and with his creditors, is left in the greatest doubt.

The case made on the proofs is, I think, one for the application of the doctrine of courts of equity that, where a deed is sought to be set aside as voluntary and fraudulent as against creditors, and the evidence is not sufficient to induce the court to avoid the deed absolutely, on the ground of fraud, but is sufficient to raise up a well-grounded suspicion as to the adequacy of the consideration and the fairness of the transaction, the court will permit the conveyance to stand only as security for the consideration actually paid. *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Demarest v. Terhune*, 3 C. E. Gr. 532; *Heintze v. Bettley*, 7 Stew. Eq. 562.

The deed from Charles to William, in addition to the homestead farm, included personal property described as "all the live stock, farming utensils and furniture, including all manner of personal property on the farm." The farm contained two hundred and seventeen acres, worth in 1877, according to the valuation put on it by witnesses, from \$40 to \$50 an acre. From the evidence, I think the farm was fairly worth, at the time of the conveyance of it, \$10,000—the value put upon it by the parties themselves. The personal property William estimates at \$1,200.

For the property conveyed William gave up his interest in the mortgage given to him and his sister in 1867, amounting to \$2,000, and gave the bond and mortgage, on which \$6,000 was due. The residue of the consideration fixed upon at the July interview was made up by an allowance of \$2,000 to William for his services.

From the time Charles became the sole owner of the farm by

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purchasing the interest of the other heirs in May, 1866, until **March**, 1877, the family lived on the farm, and its products were applied to the support of the family, and for the improvement of the farm. William had the sole management of the farming business. He employed the help, and marketed the products of the farm. He kept no account of sales or expenditures. No money was ever paid over to Charles. William says there was an agreement between him and his brother that he should be paid for his services, but no definite arrangement was made as to how he was to be paid, or on what terms he was to be employed. He managed the farm as if it were his own, supporting his mother and sister out of its products, without any accounting with his brother. No settlement was ever made, or accounting had with a view to a settlement, until the settlement of **July**, 1877.

In that settlement, \$2,000 was allowed to William for his services without any investigation or any consideration as to how much his services were reasonably worth. It was, as William said in his testimony, an allowance made to him in a lump.

Nor has any evidence been laid before the court to enable us to make any estimate of the value of William's services, or to state an account between William and Charles on that subject, or to determine whether \$2,000 or any other sum would be reasonable compensation. We have nothing before us on which to adjudge that Charles was a debtor to William in the sum named, so that the debt might be regarded as a consideration actually advanced, except the fact that Charles admitted an indebtedness in that sum.

When a debtor in embarrassed circumstances makes a conveyance to one of his creditors for a consideration apparently inadequate, the burden is thrown upon him to show by full proof that the transaction was *bona fide*; and, as against other pre-existing creditors, to sustain the conveyance the grantee must satisfy the court not only that he accepted the deed in good faith, but also that he gave adequate consideration for it. If adequate consideration be not made apparent, the court will allow the deed to stand only as security.

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This was the course adopted by Chancellor Kent in *Boyd v. Dunlap*, and by this court in *Demarest v. Terhune* and in *Heintze v. Bentley*, and should be followed in this case.

I think the decree should be reversed, and that a decree should be made directing a reference to a master to ascertain how much was due William on his mortgage, and for his services, upon an accounting between the parties; and that the property, real and personal, should be sold, the land being sold subject to the \$6,000 mortgage, and that out of the proceeds of sale there be paid the amount so found to be due to William, and that, after paying the costs of both parties, the residue be paid over to the complainant and the other creditors of Charles in the attachment suit.

For reversal and dismissal of bill—DIXON, KNAPP, REED, SCUDDER, GREEN, WHITAKER, PATERSON—7.

For reversal and modification of decree—DEPUE, MAGIE, PARKER, VAN SYCKEL, CLEMENT, COLE—6.

STEPHEN O. SMITH, surviving executor &c., appellant,

v.

EMMA L. BURNET, respondent.

1. Where, upon exceptions being filed to the account of an executor, on ground that he has not charged himself with certain shares of stock, the executor claims the stock by virtue of a gift from the deceased, he is not a competent witness under the act of 1880, or any other act, to prove a delivery of the stock by, and the alleged declarations of, the deceased at the time of the delivery.

2. Upon the hearing, a witness swore that she heard the deceased say that he had given the stock to the executor, and the executor himself swore that he had had possession of the stock since January 7th, 1875. It appeared that the deceased gave to the executor, on January 7th, a power of attorney to receive and assign scrip or dividends; that the executor drew the dividends after the death of the deceased, and paid out of the amount interest upon

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mortgage due by the deceased, and that he afterwards assigned the scrip as executor.—*Held*, that the executor failed in showing that the stock passed to him by gift.

On appeal from a decree of the ordinary, whose opinion is reported in *Smith v. Burnet*, 7 *Stew. Eq.* 219.

Mr. J. Frank Fort, for appellant.

The reasons assigned for reversal are—

I. Because the ordinary erred in holding that the testimony of Stephen O. Smith, given in the cause, was illegal.

II. Because the ordinary erred in affirming the ruling of the orphans court excluding the offer of testimony, as stated in the exception to the ruling of the orphans court, at pages 28 and 29 of the printed case. *Exton v. Zule*, 1 *McCart.* 509.

If the court think the construction here put is inadmissible, then I hold that the executor was a competent witness under the one hundred and fifth and one hundred and sixth sections of the orphans court act. *Conover v. Conover*, 3 *Gr.* 420-422; *Davison v. Davison*, 2 *Harr.* 169.

The one hundred and sixth section of this act was passed prior to the act of 1859, removing disability to be a witness from interest in the cause, and prior to the act of 1849, which allowed an adverse party to be called as a witness. *Rev. p.* 378 §§ 2, 3, *marginal notes*; *Nix. Dig. p.* 645 §§ 24, 26; *Elmer's Dig. p.* 364 §§ 19, 20.

III. Because the ordinary erred in holding that the facts proved in the cause were not sufficient to establish a gift *inter vivos*, at law, between a father and son.

The facts proven in this case seem to me to make out a clear gift *inter vivos*.

It should be remembered that the gift sought to be sustained here is between father and son, and will be presumed upon much less positive proof, and when, in fact, it might not be inferred in other cases. 2 *Schouler on Pers. Prop.* 89; *Smith v. Montgomery*, 5 *Mon.* 502; *Hepworth v. Hepworth*, *L. R.* (10 *Eq.*) 10; *Betts v. Francis*, 1 *Vr.* 152, 155.

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Declarations of an intention to give before donee had possession, are also strong evidence. *Rhodes v. Childs*, 64 Pa. St. 188; *McCluney v. Lockhart*, 1 Bail. 117.

As also subsequent declarations and admissions of having given. *Dean v. Dean*, 43 Vt. 337; *Burney v. Ball*, 24 G. 505; *Reid v. Colcock*, 1 Nott & McC. 592; *Grangiac v. Ard*, 10 Johns. 293; *Allen v. Cowan*, 23 N. Y. 502.

A writing purporting to give a bond which was transferred by delivery, but not delivered, has been held effectual. *Morgan v. Mallerson*, L. R. (10 Eq.) 475; *Voyle v. Hughes*, 2 Sm. & G. 18; *Jones v. Lock*, L. R. (1 Ch.) 25; *Marling v. Marling*, Am. R. 635; 2 Kent 438, note 1.

A gift of railroad shares, where assigned in blank, but never recorded while donor was alive, sustained in *Stone v. Hackett*, Gray 227.

The courts are now sustaining a doctrine of equitable assignment where a gift is shown to have been intended. *Camp's Appeal*, 36 Conn. 88; *Tillinghast v. Wheaton*, 8 R. I. 358.

The gift of a promissory note will be sustained when made by payee without endorsement, and donee may sue in name of personal representatives, without their consent. *Grover v. Grover*, 24 Pick. 261; *Wing v. Merchant*, 57 Me. 383; *Boles v. Kempton*, 7 Gray 382; *Simons v. Mosely*, 7 Gray 87. See 2 Redfield on Wills 312, 313 &c.

The gift of a savings-bank book, without any assignment in writing or otherwise, will pass the deposit of the donor represented in the book to the donee. *Tillinghast v. Wheaton*, 8 R. I. 536, 539; *Brown v. Brown*, 18 Conn. 410; *Waring v. Edmonds*, 11 Md. 424; *Parish v. Stern*, 14 Pick. 198; *Turpin v. Thompson*, 2 Mete. 420; *Lee v. Boak*, 11 Gratt. 182; *Coldwell v. Kenfranc*, 33 Vt. 213; *Westulo v. De Witt*, 35 Barb. 215; *Martin v. Funk*, 75 N. Y. 134.

In *Hackney v. Vrooman*, 62 Barb. 650, the court held the delivery of the original bond and mortgage, without any assignment thereof in writing, good. *Penfield v. Public Admr.*, 2 D. Smith 305. Approved in *Allen v. Cowan*, 23 N. Y. 500; *Allerton v. Lang*, 10 Bosw. 362; *Grangiac v. Arde*

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10 *Johns.* 293; *Wing v. Merchant*, 57 *Me.* 387. See, also, *Bourne v. Fosbrooke*, 18 *C. B. (N. S.)* 515; *Westerlo v. De Wolf*, 36 *N. Y.* 340.

Mr. G. F. Tuttle, for respondent.

1. The appellant, who was surviving executor of Oliver Smith, deceased, claims that the testator, in his lifetime, gave him certain stocks. Even if such gift was made, it was unaccompanied by delivery, and, therefore, was invalid, and not a complete gift at law, *inter vivos*. See *Irons v. Smallpiece*, 2 *Barn. & Ald.* 551; *Shower v. Pilck*, 4 *Exch.* 478.

2. The evidence of the appellant was inadmissible to show dealings or transactions with the testator, or statement by him. *P. L. of 1880* p. 52.

The opinion of the court was delivered by

REED, J.

The questions involved in this appeal arise upon exceptions filed to the account of Stephen O. Smith, the appellant and executor of Oliver Smith, his father.

The exceptions were filed upon several grounds, only one of which, however, is involved here. It is upon the ground that the accountant had not charged himself with one hundred and one shares of the stock of the Newark Mutual Fire Insurance Company, and with the dividends received therefrom.

By the testimony taken before the orphans court it appears that Oliver, the testator, in his lifetime, was the owner of the shares of stock to which the exception alludes. There was no contention upon this point, but it was admitted that two months previous to his death, Oliver was the owner of this stock.

The contention of the executor was, that at the time of Oliver's death, which occurred on the 6th day of March, 1875, Oliver was not the owner of the stock, and so he, Stephen, was not bound as executor to account for it as part of the testator's estate. It was insisted that Oliver, the testator, had given this

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stock to the executor, who was his son, and the establishment of the gift became the objective point of the testimony taken before the orphans court.

The evidence there taken disclosed the following state of facts: It appears that, on January 7th, 1875, Oliver Smith, the testator, had this stock standing in his name on the books of the Newark Fire Insurance Company. On that day Stephen O. Smith, the executor, appeared at the office of the company, and presented the following paper:

"I hereby appoint Stephen O. Smith my attorney, to receive and assign any scrip or dividends due, or belonging to me, in the Newark Mutual Fire Insurance Company, and to receive the interest thereon.

"OLIVER SMITH."

"Dated, January 7th, 1875."

By virtue of this instrument, Stephen drew the January dividend of that year, amounting to \$45.45; out of this was deducted \$35.40, the amount of interest due upon a mortgage for \$1,000 held by the company against Oliver, and the balance was paid to Stephen. This was on January 7th or 8th. On March 6th, following, Oliver died. On the 1st of April thereafter, Stephen O. Smith, upon the transfer-books of the company assigned this stock from himself, as executor, to himself individually. He subsequently drew the dividends for the years 1876 and 1877, and afterwards assigned the stock to one Stephen H. Plum. All this appeared by the testimony of the secretary of the fire insurance company.

In addition to this was the testimony of one Louisa Riker, an adopted daughter of Oliver, who was present with him during his last illness. She says that one day, Oliver, after looking over his papers and taking out his scrip, said that he was going to give that to his son Stephen. Stephen was not then at his father's.

She says, further, that one day, about the 1st of January, after Stephen came home, Oliver told her that he had given Stephen that scrip.

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At this point of the trial the executor himself was sworn, who testified that he had possession of the stock after January 7th or 8th.

His counsel offered to prove by him that the deceased had transferred the stock to him, and stated, at the time of the transfer, that he gave it to him. This offer was overruled by the court, and this ruling is now attacked as erroneous.

The question is whether the accountant should have had the benefit of this testimony, of which, by the ruling, he is deprived.

Without the aid of legislative action the accountant was incompetent to testify, by reason of his interest in the event of the cause.

By the act of 1859, now section 34 of the act concerning evidence (*Rev. p. 378*), the common law disqualification of a witness in civil actions on account of his or her interest in the event of the suit, was removed, except as to parties to actions in which the opposite party should be prohibited by any legal disability from being sworn as a witness, or either of the parties should sue or be sued in a representative capacity.

The latter part of the restriction upon the body of the act was modified so as to permit a party suing or being sued in a representative capacity to offer himself as a witness, and if he should do so, then the opposite party, by this act, became qualified.

By the act of 1880 it is provided "that in all civil actions in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action."

If the act of 1880 includes within the scope of its operation the proceeding which we are now considering, it is apparent at a glance that the testimony of Stephen O. Smith was properly excluded. The offer was to prove a delivery to him by the testator of the stock, and a statement by the testator of his intentions, at the time of the delivery, to make a gift. It needs no discussion of the objects which this legisla-

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tion is designed to secure, to vindicate the action of the orphans court. The offer was so clearly repugnant to the letter of the supplement that no appeal to the spirit of the legislation is essential, although it could be effectually invoked if requisite to support the ruling.

The argument pressed upon the court as a reason for reversing the decree which affirms the exclusion of this evidence is, that the act of 1880 does not apply to the case as it was presented to the orphans court. It is contended that the proceeding was not a civil action in which a party is sued in a representative capacity, and it is further contended that if it can be said to be such an action, yet the executor could be the only one occupying that position, and as to him (if he chooses to present himself as a witness) the act of 1880 does not apply.

In the examination of the questions thus raised it is observable that the legislation under which they arise is not peculiar to this state. In the federal statutes, and in the acts of the legislatures of a number of states, similar enabling acts, with almost indential restrictions, are found. *U. S. Rev. Stat. ch. 17 § 858; New York Code, title Examination of Witnesses, § 399; Bright. Purd. Dig., title Evidence, p. 624 § 16; Rev. Stat. of Ohio, title Evidence, § 5242; Code of Georgia, title Evidence, § 3798.* There are similar provisions in the statutes of other states.

Most of the cases in which the courts have been called upon to construe the operation of these acts are collected by Dr. Wharton under sections 464 to 478 of his work on Evidence. An examination of the cases will disclose the fact that in applying the acts both in their aspects as enabling acts as well as in their restrictive features, the courts have regarded the object of the legislation rather than the letter of the acts.

As enabling acts the federal courts have included within the term "civil action," as used in the act, all proceedings which are not criminal, and include suits in chancery as well as actions at law. *Rison v. Cribbs, 1 Dill. 181; Green v. United States, 9 Wall. 655; United States v. Ten Thousand Cigars, Woolw. 123.*

Inasmuch as without the enabling act interest would still continue to disqualify, therefore the liberal interpretation applied

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to **the** terms of the enabling part of the act was necessarily applied to its restrictive clause. The object of the restrictive clause in all the statutes is mutuality. Their purpose is, in the language of Dr. Wharton, to provide that when one of the parties to a litigated obligation is silenced by death, the other shall be silenced by law.

In enforcing the object of the statute, courts will look at the substance of the cause and observe, through the forms of the procedure, who are the real parties whose interests are antagonistic, and then will see that when one is put at a disadvantage by death, the other shall not be permitted to profit by the misfortune of his adversary. So the expression "civil action," as used in the Pennsylvania statute, was held to include all civil proceedings, and it was ruled that a distributee was not a competent witness, in the distribution of a decedent's estate, as to matters occurring in the lifetime of the decedent. *McBride's Appeal*, 72 Pa. St. 480.

By the Ohio statute, the testimony of parties is excluded when relating to transactions between him and a deceased person against whose estate he asserts a claim. In an action against a person who was at the same time executor and legatee upon a refunding bond given by him as legatee, under an act, it was held that he could not testify to transactions which occurred between him and the testator; the court saying, "the reason of the law certainly applies in this case with the same force as if the residuary legatee had given the ordinary bond, and had been since sued as executrix. The form of the remedy given to the creditors of the estate can make no difference." *Stevens v. Hartley*, 13 Ohio St. 525.

The evidence act of Georgia, 1865-6, authorizing parties to be witnesses, excepts cases where one of the original parties is dead, or where an executor or administrator is a party to a suit on a contract of his intestate or testator. An administrator filed a bill against the legatees and creditors to marshal the assets, and it was held that one legatee could not give in evidence a transaction with the testator to show the priority of his claim to that of others. The court said that the case was technically

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within the words of the act, but that beyond that, the other creditors were privies of the testator; they stood in his shoes; his property was in trust for their benefit, and *prima facie* for their equal benefit. Is it fair, said the court to them, his successors, to permit one of the parties to the contract to be a witness, when the other party, to whose rights they succeed, is not here to confront the witness? *Latimer v. Sayre*, 45 Ga. 468.

In the case of *Redman v. Redman*, 70 N. C. 257, the supreme court of North Carolina held that they would look at the interest of the party, and if he was in interest a plaintiff, although appearing as one of several defendants, they would treat him as plaintiff.

It is apparent that the object of the legislature is to be primarily regarded, and that the object is to close the mouth of a party whose interest is antagonistic to the estate of a deceased person in regard to those transactions and conversations in which the deceased bore a part, and concerning which he, if living, would be the most important, perhaps the only witness beside the opposing party.

The executor in the present case, while still executor, became, by the shape of the proceedings in the orphans court, a party in antagonism to the estate which, as executor, he represented. Had he not been executor, he must have brought his action as any other creditor, and he would have been clearly disqualified as a witness to prove the offer of his counsel made in this proceeding.

By the fact of his being executor, the only method of contesting his claim was by an effort to surcharge the estate with the amount of the assets which he claimed individually. This was accomplished by exceptions to the account. Whether it is said that the exceptants thereafter in that proceeding represented the interests of the estate, as they really did, or it be said that the accountant represented the estate technically as executor against a claim by himself individually, I think the proceeding was one which placed the accountant within the proviso of the act of 1880, and his offer was properly overruled.

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The ordinary was clearly right in holding that it did not come competent by force of section 106 of the orphans court act.

The important question is, whether, upon the evidence as it stands, Stephen has proved a gift to himself by his father. The burden of proving a valid donation of the stock is upon him. *Kent* 244; *Irons v. Smallpiece*, 2 Barn. & Ald. 551; *Walter v. Lodge*, 2 Swanst. 97; *Grey v. Grey*, 47 N. Y. 552; *Dilts v. Evenson*, 2 C. E. Gr. 407.

The chancellor found that the testimony was insufficient to show a delivery of the stock in pursuance of an intention to transfer absolute title to Stephen.

The declarations of the deceased, if made as sworn to, standing alone, would be of little or no force.

A gift without consideration requires, as an essential element, delivery. To a mind unacquainted with the technical rule that in law an actual or symbolical tradition of the chattel is necessary to transfer the title, such an act would ordinarily not appear important. A statement, therefore, that a gift had been made would not, I think, of itself, import a compliance with all the technical requirements of a legal gift. The supreme court of Massachusetts has held that the delivery of a chattel necessary to the validity of a gift *causa mortis*, was not proved by subsequent declarations of the deceased made shortly before his death by a person not connected with the gift. *Rockwood v. Wiggin*, 1 Gray 402.

Where there is other evidence of a transference of the chattel from the possession of the alleged donor to the donee, the evidence of such declaration becomes important in fixing the meaning of the act transferring the possession.

Evidence of such declarations are then relevant, and, in such instances, important in determining whether a gift, a bailment or a trust, was intended at the time of the tradition. *Notes to Ward v. Turner*, Lead. Cas. in Eq. (Fourth Amer. ed.) vol. I. p. 41.

In this case, Stephen swore that he had possession of the stock on February 7th or 8th. This evidence was not the subject

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of objection. Had it been, then, as such possession was by him referable to an act of the deceased in passing possession to him, it would probably have been as objectionable as the evidence propounded in the offer. On the other hand, Lydia Riker thinks that she saw the stock in the chest of the deceased at a period later than the 8th of February.

Assuming, however, that it appears that Stephen had the possession subsequently to that date, the question arises whether it appears that such possession was delivered with an intention to confer upon him dominion over the stock as the absolute owner thereof. Proof of such an intent is absolutely essential to support the gift. *Gray v. Barton*, 55 N. Y. 68; *Hitch v. Davis*, 3 Md. Ch. 266; *Egerton v. Egerton*, 2 C. E. Gr. 419.

The only proofs of such intent on the part of the deceased are the declarations made, not contemporaneous with such delivery, but at some time preceding, and probably again subsequent thereto. In regard to such declaration sworn to by a third party, they should be scanned with circumspection.

The word "give" is often used with other meaning than as evincing an intent to confer the title in the thing delivered.

You give a person an article to carry for you, or to perform work upon. This would not be an unusual or improper use of the word when employed in connection with a delivery for a special purpose. "I intend to give that paper to Stephen to take to the office," or, "I gave that to Stephen," meaning that Stephen should do some act in connection therewith for the giver, would not be an unusual expression, as the word is loosely employed in daily transactions. This view, together with the difficulty of recalling or stating with accuracy all that was said, and how it was said, should cause such a declaration to be closely scrutinized before a title is passed solely upon testimony like that here adduced.

But the remaining evidence in this case, resting upon proof which appears by written testimony, and uncontradicted, appears to me to be so inconsistent with the view that there was a transfer of the property in this stock to Stephen, that I think the conclusion of the ordinary was clearly right.

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In the first place, the delivery of the stock, if delivered, was accompanied by a power of attorney, which has already been set out. The possession by Stephen of the stock, as explained by this instrument, is the possession of an attorney for his principal. Neither the form of that instrument nor its purpose, as explained by the secretary of the fire insurance company, is consistent with the view that it was used to convey title to the stock, but rather imports that its purpose was to empower the agent to do acts relative thereto for the convenience of the principal. There is nothing in the generality of the power to indicate that it was intended to empower Stephen to assign to himself or to receive for himself the proceeds of an assignment to another. The presumption arising from the form of the power is, that his acts under it were the acts of the principal as still the owner of the stock.

Again, the first act which Stephen did under this power was inconsistent with the view that he was the absolute owner. Out of the proceeds of the dividend of 1875, he paid the interest upon a mortgage which his father owed to the insurance company.

What became of the remainder of that dividend does not appear, after it came to the hands of Stephen. This act standing unexplained implies that Oliver still controlled the proceeds of this stock, and such control is fatal to any claim that the transfer of possession was by way of a gift.

Again, when Stephen, subsequently to the death of Oliver, made an assignment of this stock to himself, he did so as the executor of his father. His assignment was not made as the owner of the stock, but as the representative of his father's estate.

It is true that he says that the secretary of the company directed the form of the assignment, but the fact that the inconsistency of such an assignment with his claim as owner by gift did not strike him at the time, is a matter of some significance in determining the question now under consideration.

I think, upon all the facts, the accountant below did not

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prove that he held the stock as owner, and that the decree of the prerogative court should be affirmed.

Decree unanimously affirmed.

GEORGE B. SWAIN, appellant,

v.

WILLIAM R. FRAZIER, administrator, respondent.

1. Receipts, though *prima facie* evidence of discharge of an obligation, may always be explained and contradicted by other evidence.

2. Where receipts, upon a bond secured by mortgage, which purport to be of money, are shown to be of the obligor's unsecured promissory notes, the burden is upon him who claims the benefit of the discharge evidenced by the receipts, to show that such notes were accepted upon an agreement that they should operate to satisfy so much of the debt. The acceptance of notes for a pre-existing debt, will not operate to discharge such debt, unless it be agreed that such shall be its effect.

3. Such receipts, if expressed to be in full, would be evidence of an acceptance of the notes in satisfaction, unless explained; but if, in addition, it appear that the obligee was illiterate, of great age, and made her mark to the receipts, at the instance of the obligor, who drew them, and who was a near relative, in whom she would have a peculiar confidence, the person claiming the discharge will be required to establish that the obligee designed and intended thereby to satisfy the debt evidenced by the bond.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Wildrick v. Swain*, 7 *Steele* Eq. 167.

Mr. Carl Lentz, for appellant.

The bill in the above cause is filed to foreclose a mortgage, dated April 10th, A. D. 1850, and signed by Abraham Wildrick and Isaac Wildrick, and marked "Exhibit B on part of complainant." The mortgage was given to secure payment of a bond made

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by Abraham Wildrick and Isaac Wildrick to Susan Wildrick, in the sum of \$2,000, to secure an annuity of \$120 during her life, and which bond is marked "Exhibit A on part of the complainant."

On the 12th day of August, A. D. 1881, an interlocutory decree was signed in this cause, ordering and decreeing a reference to ascertain the amount due to the complainant, and directing that in computing the amount due on the complainant's mortgage, only such payments as were made in cash are to be credited thereon, and not those made in notes.

I. The mortgagee agreed to accept the notes as absolute payment.

It is always a question of intention, sometimes to be ascertained by the legal construction and effect of written instruments, sometimes by the circumstances of the case. *Schanck v. Arrowmith*, 1 Stock. 314.

Where a note was given for the amount of interest accrued on a mortgage, together with a further loan made at that time, and an endorsement was made on the mortgage note, "received on the within, interest up to date," and there was evidence that the note was intended by the parties to be taken in payment of the interest, it was held that such interest was no longer secured by the mortgage. 2 *Jones on Mort.* § 923, and note 2.

A mortgage is security only for the debt thereby secured, and cannot be held for other debts from the mortgagor, even as against him; and the mortgagee will be compelled to discharge the mortgage upon the payment of that debt. *Beardsley v. Tuttle*, 11 Wis. 74; *Morse v. Vail*, 2 Beas. 295; 2 *Jones on Mort.* §§ 918, 931.

Mr. L. Dewitt Taylor, for respondent.

I. The decree advised by the vice-chancellor should be affirmed, because the answer and the evidence show clearly that the money agreed to be paid, according to the condition of the bond, has not been paid.

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II. That the receipts signed on the bond do not represent payments in cash.

III. That Susan Wildrick never received or accepted the notes given for the annual payments on the bond (which bond was intended to provide an equivalent for the mortgagee's interest as dowress in the lands mortgaged), in satisfaction of the annual payments due on the bond, and the lien of the mortgage is in full force.

IV. That there is no settlement proved to have taken place between complainant and defendant, at which time, as alleged in the answer, it was ascertained there was due \$452.27 on the bond in suit.

V. That there can be no estoppel in this case, as defendant, Swain, is one of the grantees named in the deed (Exhibit No. 4), dated June 1st, 1874, for a part of these premises, and October 16th, 1875, conveys the mortgage premises to Charles B. Thurston; and this conveyance contains this language: "This conveyance is made subject to certain encumbrances now liens on said premises."

The notes given for the annual payment did not operate as a discharge or satisfaction of the debt, and the acceptance of the same cannot have that effect, as there is no proof that they were accepted as a discharge or satisfaction of the debt. *Schanck v. Arrowsmith*, 1 Stock. 314; *Hutchison v. Swartsweller*, 4 Stew. Eq. 206; *Byles on Bills* (6th ed.) 571; 1 *Smith's Lead. Cas.* 616; 2 *Jones on Mort.* §§ 924, 926; *Freeholders of Middlesex v. Thomas*, 5 C. E. Gr. 41.

New York authorities hold the same view, and go farther, and hold that the acceptance by a creditor of a new promise from his debtor, to pay a pre-existing debt, affords no defence whatever to a suit on the original cause of action, even if the creditor expressly promised that the new promise should operate as a satisfaction of the old. *Frisler v. Larned*, 21 Wend. 452; *Rice v. Dewey*, 54 Barb. 455.

If the administrator was advised to ignore the notes and prose

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cut the bond and mortgage, he did just as numerous authorities hold he may do. *Cumber v. Wane*, 1 *Smith's Lead. Cas.* 616.

The delivery of the notes, under the circumstances in this case, to the mortgagee, did not discharge the mortgage. No change in the form of indebtedness—nothing short of actual payment of the debt or an express release, will operate to discharge the mortgage. 2 *Jones on Mort.* § 924.

Recovery of judgments on the notes cannot avail the defendant in this case, as it is not a defence made by the answer. The defendant must abide by the case made by his answer, and not be permitted to take advantage of another case made by the proofs. *Mead v. Coombs*, 11 *C. E. Gr.* 173; *Chandler v. Herick*, 3 *Stock.* 497.

Nevertheless, the merger of the notes in judgment does not extinguish the debt, and the mortgage continues a lien till it is satisfied or the judgments are barred by the statute of limitation. 2 *Jones on Mort.* § 936; *Flanagan v. Westcott*, 3 *Stock.* 264.

The opinion of the court was delivered by

MAGIE, J.

The decree appealed from was made upon a bill filed to foreclose a mortgage given by Abraham and Isaac Wildrick to Susan Wildrick, now deceased, of whose estate respondent is administrator. The mortgage is dated April 10th, 1850, and it secured the bond of Abraham and Isaac Wildrick to Susan Wildrick, in the penalty of \$2,000, conditioned that the obligors should pay her \$120 and should furnish her a stipulated amount of firewood in each subsequent year of her life. She lived until August 3d, 1875, having then attained the age of one hundred and one years.

The bill is in the ordinary form, except that it charges that said bond was endorsed with various receipts for payments thereon, which payments are stated not to have been made in money, as shown by the receipts, but by the promissory notes of the obligors. It is charged that such notes have never been

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paid, and that the sums represented thereby yet remain due ~~on~~ ^{for} the bond. The answer was called for without oath.

The appellant Swain, who was a defendant to the bill ^{as} owner of some of the mortgaged premises, answered and ^{ad-}mitted that \$350 was due upon the bond, which amount ^{he} claimed was ascertained to be due on May 6th, 1876, in a ^{set-}tlement then had between him and respondent. He also claimed that the notes of the obligors, taken from time to time, ^{when} the receipts were endorsed on the bond, were in fact accepted by Susan Wildrick as actual payments in discharge of so much ^{of} the moneys due on the bond.

Upon the issue thus formed the conclusion arrived at in ^{the} court below was adverse to the claim set up in the answer. ^A decree was made establishing the right of the complainant ^{be-}low to a foreclosure and sale of the mortgaged premises to ^{raise} not only the amount admitted by the answer to be due on ^{the} bond, but also the amount represented by notes of the obligors ^{given} for moneys due to the obligee upon the bond, and a ^{ref-}erence was directed to ascertain the amounts so due. From ^{the} decree the defendant Swain appealed.

Upon the argument here, the counsel of appellant did ^{not} contend that the vice-chancellor, before whom the case ^{was} heard, erred in the legal principles he applied. The sole ground ^{and} relied on for reversal is the alleged error in the deductions ^{of} fact he made from the evidence.

Some of the legal principles laid down by the vice-chancellor are so elementary that it is unnecessary to do more ^{than} state and approve them. That receipts, although *prima facie* evidence of payment and acquittance of a debt, are always ^{open} to explanation and contradiction by any kind of appropriate ^{ev-}idence, is a proposition too well settled to admit of discussion. It is no less undoubted law that an estoppel against the enforce-ment of an obligation will not arise upon receipts untruthfully acknowledging satisfaction thereof, unless it appear that the ^{per-}son claiming the estoppel has been induced, by knowledge ^{of} such receipts, to place himself in a position or to adopt a ^{course}

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of conduct which would render it inequitable to enforce against him the obligation thus apparently satisfied.

The vice-chancellor further held that the acceptance of the promissory note of a debtor for his pre-existing debt, will not operate as a discharge or satisfaction of the debt, unless the creditor agrees that such shall be its effect. The question involved in this proposition, though much discussed elsewhere, is now for the first time, so far as I can ascertain, presented for the consideration of this court, and it may be well to briefly consider it.

The question is not a new one in the courts of this state. In 1853 Chancellor Williamson held that, whether a note given for a legacy, charged upon land of the maker, was to operate in payment of the legacy or not, was a question of the intention of the parties to the transaction. *Schanck v. Arrowemith*, 1 Stock. 314. In *Shipman v. Cook*, 1 C. E. Gr. 251, Chancellor Green seems to admit the same rule as unquestionable. In *Freeholders v. Thomas*, 5 C. E. Gr. 39, Chancellor Zabriskie said that it was well settled that a note, either of the debtor or a third person, received for a debt, is not payment, if not itself paid, except in cases where it is positively agreed to be received in payment. The same principle was applied by Vice-Chancellor Van Fleet in *Hutchinson v. Swartsweller*, 4 Stew. Eq. 205. Under such circumstances it would be questionable whether, if there were doubts respecting the rule, it would be wise at this day to attempt to modify or reverse it.

But the rule is sustained by the great weight of authority in England and in this country. Mr. Addison so states the rule to be established in his work on Contracts, and the English cases may be found collected in the notes to section 333 of Morgan's edition. The American cases are collected in the note to 2 *Pars. on Cont.* *624, *681, and in the notes to *Tobey v. Barber*, 2 *Am. Lead. Cas.* 179, and to *Cumber v. Wane*, 1 *Smith's Lead. Cas.* 445. Later cases will be found in *Bigelow on Bills and Notes* 499. According to the nearly unanimous doctrine of these cases, a creditor may agree to accept a new promise of the debtor in satisfaction of a pre-existing debt.

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A different doctrine has been enunciated in the courts of New York. In the case of *Waydell v. Luer*, 5 Hill 448, it was declared that the acceptance of a new promise could not be permitted to operate in discharge of a pre-existing debt, even in cases where the creditor had expressly agreed that such should be its effect. This proposition was supported by a very ingenious and able opinion of Judge Cowen. The case was afterwards reversed in the court of appeals (3 Den. 410), but on the point in question the opinions were so divided that the reversal does not seem to have shaken the authority of Judge Cowen's opinion. It was approved in the case of *Hill v. Beebe*, 13 N. Y. 556. The late case of *Feldman v. Beier*, 78 N. Y. 323, seems to indicate, but does not directly express, a modified view.

The doctrine of the New York cases not only stands opposed by the whole current of decision elsewhere, but seems to be unsupported by any substantial reason. The ground on which their conclusion is put is, that the agreement of the creditor to accept a new promise is one without consideration. This is inconsistent with the view adopted by the same courts and by the same judge respecting a similar transaction. Thus, in *Myer v. Welles*, 5 Hill 463, Judge Cowen held that the acceptance of the debtor's own obligation, payable at a future day, is a sufficient consideration for, and amounts to a suspension of the remedy on the original debt, so as to discharge a surety. It will be difficult, I think, to discover any ground to support both these decisions. As was said by Redfield, J., in *Babcock v. Hawkins*, 23 Vt. 561, there is no want of consideration in any case where one contract is substituted for another. Any other view is a mere technical and unnecessary restraint on transactions between debtor and creditor. "Sound sense would seem to permit an obligee to liquidate his damages, and by accord to take whatever he might please to take in satisfaction of them." *Morris Canal v. Van Vorst*, 1 Zab. 109.

The rule on this subject applied by the vice-chancellor seems, therefore, to be entirely satisfactory.

Turning to the evidence, the vice-chancellor seems justified in the conclusions he reached. The case discloses that the bond,

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when produced, bore upon it thirteen receipts, the first dated April 1st, 1854, and the last April 1st, 1868, to all of which the mark of the obligee was affixed. All but one of them were attested by witnesses. All expressly acknowledge the receipt of money, either "in full," "in full up to this date," or for a specified year. Four other receipts, dated on April 1st of the years 1869, 1870, 1871 and 1872, are also endorsed on the bond, expressed in a similar manner, but these have not been executed.

Upon proof of the execution of these receipts, if they remained unexplained and uncontradicted, no decree could have been made to include the money represented thereby. But they are not unexplained. They are contradicted. Besides other testimony, the evidence of Isaac Wildrick, one of the obligors who was called by the appellants, renders it entirely certain that the obligee did not receive the money which the receipts acknowledged. He admits that he, acting for himself and the other obligor, who was his brother, gave to the obligee for much the larger part of the sums annually accruing on the bond, the notes of himself and his brother. He substantially admits that their notes, amounting to over \$2,600, which were in obligee's possession when she died, were almost entirely composed of the notes given her for the annuity secured by the bond and mortgage, or renewals of such notes. These remain outstanding and unpaid.

This proof contradicts the receipts and deprives them of probative force. Unless, therefore, it further appears that the obligee agreed to accept the notes in satisfaction for the amounts due on the bond, it will not be treated as satisfied thereby. The burden of convincing the court that such an agreement was made, rested upon the appellant.

If these instruments had acknowledged the receipt of the notes in full for the amounts due on the bond, they would, undoubtedly, be *prima facie* evidence of their acceptance in satisfaction. In their present shape, unexplained, they would produce a like effect. Such was the view taken by Chancellor Williamson in *Schanck v. Arrowsmith*, *supra*. But he held that this presumption might be overcome, either by positive testimony or

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by circumstances. In the case of *Sutton v. The Albatross*, 2 Wall. Jr. 327, Judge Grier held that a lien was not necessarily discharged by taking a note and giving a receipt in full. Such a receipt could be explained by showing, negatively, that there was no contract or contemplation to discharge the lien, or by showing positively, by even slight facts, a different purpose that induced the transaction.

In this case the evidence does not leave the receipts capable of raising the presumption of an acceptance in satisfaction. Besides the fact that they do not express the real thing received, it appears that the obligee was a woman of great age; that she was illiterate; that the obligors, or one of them, drew the receipts and they were executed at their instance; and that they were step-sous of the obligee, in whom she would naturally confide. These considerations are quite enough to deprive the receipts of that evidential force which they would otherwise be entitled to. When such circumstances are shown, it is manifest that the appellant was bound to convince the judgment of the court that the obligee understood the transaction and intended thereby to accept the unsecured obligations of her debtors in complete satisfaction for so much of her annual stipend, before then secured by a good bond and mortgage.

A careful examination of the evidence is convincing that, while there is not the slightest ground to impute to the obligors an intention to deprive the obligee of the security of the mortgage, there is nothing to show that she ever understood that the receipts, if unexplained, might have that effect. Not a single word or act of hers has been proved justifying the conclusion that she had, in fact, agreed to accept the obligor's notes in satisfaction of her bond, and to surrender the security she held therefor. It is apparent from the testimony of Isaac Wildrick that the old lady was of a careful and saving disposition, and desirous of accumulating what she could save out of her income. Other evidence shows that she designed her savings for the benefit of her own and only child. She consequently accepted such part of her annual stipend as she required, in money. For the balance she took notes, for the express purpose of saving it for

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distribution after her death. This is not only entirely consistent with her intending to retain thereon the security of the mortgage, but would seem inconsistent with an intention to surrender a security for such savings. The whole testimony fails to convince that the obligee ever understandingly agreed to surrender the security or to accept these notes in satisfaction of the bond.

With respect to the claim of appellant that the respondent is estopped from enforcing this mortgage because of an alleged settlement between them at which only \$350 was claimed to be due on the bond, it is sufficient to say that there is no evidence to support it. The appellant became purchaser of the mortgaged premises after almost all the receipts were endorsed on the bond. He was told by Isaac Wildrick, previous to his purchase, that the amounts accruing on the bond had been settled up to 1872. He is not shown to have inquired of deceased whether that was true, nor how the settlement had been made. He does not appear to have been informed of the receipts. There is some evidence of a conversation between him and respondent, at which the latter made no claim that the amount of the unpaid notes was due on the bond. There is nothing to fix this as occurring before appellant's purchase; on the contrary, the inference is that it was afterwards. Therefore, there was nothing in the conduct of deceased or her representative which induced him to purchase or adopt any course of conduct so as to render it inequitable to permit the mortgage to be enforced.

The decree below ought to be affirmed, with costs.

Decree unanimously affirmed.

Clair v. Terhune.

HENRY CLAIR, appellant,

v.

CHARITY ANN TERHUNE, respondent.

1. An appeal from a final decree brings before the appellate court all interlocutory orders or decrees involving the merits.

2. On appeal from the final decree, the appellate court will decide whether a decree of reference, prescribing the limits of the accounting, be right. But items clearly within the limits of the reference, not allowed by the master, where exceptions to the report have not been filed, will not be considered.

Mr. G. Ackerson, jun., for the appellant.

Mr. C. H. Voorhis, for the respondent.

The opinion of the court was delivered by

PARKER, J.

The bill in this cause was filed by Charity Ann Terhune against Henry Clair, the Mutual Life Insurance Company of New York, James F. Preston, and Garret R. Herring, sheriff of the county of Bergen.

The bill charges that complainant, being owner in fee of certain real estate at Binghamton, in the state of New York, was induced by her husband to exchange the same for lands in the township of Englewood, in this state; that her husband and his brother-in-law, Henry Clair, by importunity and pertinacity, while her mind was weak and without power to resist, succeeded in obtaining from her a deed to Clair for the Englewood property, without giving her any consideration therefor; and that, after the deed was thus obtained, Clair, without her knowledge or consent, mortgaged the premises to the Mutual Life Insurance Company of New York, to secure the payment of

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\$3,000, and subsequently to James F. Preston, to secure the further sum of \$4,000.

The bill also charges that complainant never received any part of the moneys alleged to have been obtained upon said mortgages, and had not derived any benefit therefrom.

It was further charged that Preston had commenced foreclosure proceedings, and obtained a decree and execution, under which the sheriff had advertised the premises for sale.

The prayer of the bill was, that the said mortgages be decreed to be void as against complainant; that Clair and wife be directed to reconvey the premises to her, free from all encumbrances, and for general relief.

Henry Clair, the only answering defendant, denied the material allegations of the bill, and alleged that the complainant, being of sound mind, without solicitation on his part, applied to him to aid her to raise money to pay a debt she owed to one Phelps upon the exchange of the Binghamton property for the Englewood premises, and also to satisfy certain judgments against her husband; that, to aid her in making such payments, he loaned her the sum of \$2,500; that, in response to her proposition, he accepted from her a conveyance of the Englewood property, to enable him to give a mortgage thereon for the purpose of raising money to repay himself the sums he had advanced at her request; that, with complainant's consent, he first executed a mortgage on the premises to one Hardenbergh, for the sum of \$2,500, with the proceeds of which he repaid himself the moneys he had advanced; that, subsequently, with her consent, he executed a mortgage on the same premises to the Mutual Life Insurance Company of New York, for the sum of \$3,000, and with the proceeds paid the Hardenbergh mortgage, and some claims against complainant's husband, at her request.

The answer is not under oath.

The cause was referred to one of the advisory masters of the court of chancery, who, after hearing testimony and argument, advised a decree.

By that decree (made on the 26th day of March, 1880), the mortgage given to the Mutual Life Insurance Company of New

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York was declared valid, and the bill, as against that company, was dismissed ; the Preston mortgage was set aside ; the defendant, Clair, was directed forthwith to reconvey to complainant the Englewood property, subject only to the mortgage of the insurance company ; Clair was ordered to account to complainant for all moneys borrowed by him on the premises ; and that, upon such accounting, he should be credited with all moneys necessarily and legally required to be, and actually paid by him, by the contract under which the exchange of the Binghamton and Englewood properties was made, taxes by him paid on the Englewood property, and all necessary expenses in prosecuting said loans, advertising and taking care of that property.

Additional evidence was taken before the master who was directed to state the account, and on the 4th day of June, 1881, his report was made, in which he charged Mr. Clair with the \$3,000 borrowed and received by him from the Mutual Life Insurance Company of New York, and credited him with various sums, amounting to \$1,411.05, leaving a balance due from Clair (including interest to the date of the master's report) of \$2,247.42.

No exceptions to the report were filed, and a decree of confirmation was signed. The final decree directing Mr. Clair to pay the money found due to complainant, and awarding execution to collect same, was signed on the 4th day of June, 1881. It is from this decree that the appeal was taken.

Upon the argument, objection was made to that part of the decree of August 26th, 1880, which limits the credits to be given appellant in the accounting.

It was suggested that, on appeal from the final decree, this court could not consider the interlocutory decree ; but the contrary has been repeatedly held.

Where a final decree involves the merits which had previously been settled by an interlocutory order, an appeal from the final decree brings the whole case before the court. *Crane v. De Camp*, 7 C. E. Gr. 614.

Where the final decree involves the point decided by the interlocutory decree, an appeal from the final decree may question

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the correctness of the interlocutory decree on which it was founded. *Terhune v. Colton*, 1 Beas. 312.

An appeal from a final decree brings before the appellate court all interlocutory orders and decrees involving the merits. *Decker v. Ruckman*, 1 Stew. Eq. 614.

In the case last cited, the court held that the interlocutory decree of reference instructing the master, limiting his inquiry and the scope of his report, and necessarily affecting the merits, was reviewable, although exceptions had not been filed.

The evidence before the advisory master, as well as that subsequently taken, shows conclusively that the limitations in the decree of reference in this case were right.

The appellant contends that the directions for the accounting should have been broad enough to have included among the credits to be given him, the following items, viz.: \$100 paid by him to the husband of respondent; \$571.79 which he had paid on judgments against her husband; \$344.30 for tuition and board of a son of respondent, whom his father had sent to college; and the further sum of \$325.12 paid in cash by appellant to the husband of respondent. It appears by the evidence that the appellant had no right to pay any of those items out of the moneys raised by mortgage on respondent's property, and neither of them should be credited in the accounting.

Before the master who was appointed to state the account, the appellant swore that the respondent knew these payments were to be made by him out of the moneys raised by mortgage, yet raised no objection; but in his evidence before the advisory master (which the chancellor directed to be used at the accounting, in connection with the other proofs), he said he had but one conversation with the respondent about the matter, "when she said 'I think we had better give you a deed for that Englewood property; we can save that, anyhow;'" I said, 'Very well, that will be all right;'" I have had no further interview with her, either before or after."

In her evidence, the respondent denies unequivocally that she ever authorized the appellant to borrow money on the property for any purpose. She says that she never directed him to pay

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her husband's judgments, nor his debts of any kind, nor to give him any money. She further says she did not know that the mortgage had been given and the moneys paid until long after the transactions.

At the time of these transactions, the appellant knew that the relations between the respondent and her husband were not harmonious.

The decided preponderance of evidence upon which the order of reference was founded (which preponderance has not been changed by the subsequent proof), was in favor of the position of the respondent.

The decree of reference should not be disturbed. It properly limited the inquiry upon the accounting to credits for moneys paid by appellant upon the exchange of the properties therein mentioned, taxes paid, necessary expenses in procuring the loan, advertising and taking care of the Englewood property. These payments she has the benefit of, as owner of the property, which was directed to be reconveyed to her; and all those which were proved were allowed as credits.

There was an item stated as "commissions on exchange of properties, \$115;" also, another item was claimed as "legal expenses, about same." These came within the limits of the reference, but they were not allowed. If this court had the power to review these in the absence of exceptions to the master's report, it would be found that they were not proved, the evidence offered being hearsay. But these are not reviewable, because, being within the language of the reference, and presented to the master, their non-allowance should have been the basis of exceptions to the report. After confirmation of report without objection, it is too late to ask the appellate court for relief as to these items.

On appeal from final decree, the appellate court will decide whether the decree of reference prescribing the principle to govern the accounting be right, and will remit to have items allowed which have been improperly excluded by the terms of the reference; but items clearly within the principle of the refer-

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ence, not allowed by master, where exceptions to the report have not been filed, will not be considered.

The decree should be affirmed, with costs.

Decree unanimously affirmed.

ISAAC W. PANGBORN et al., appellants,

v.

CITIZENS BUILDING ASSOCIATION OF PLAINFIELD, respondent.

A director of a building association, who gave to the association an ordinary bond and mortgage for a loan, cannot set up as a defence to its foreclosure, that by a secret parol agreement between him and the other directors, the loan was to be and had been repaid and the mortgage satisfied by his shares of stock in the association having been fully paid up after the loan was made.

On appeal from the decree of the chancellor, founded on the following opinion of Vice-Chancellor Dodd :

The bill is to foreclose a mortgage dated September 18th, 1875, made by the defendants to the complainants, to secure the sum of \$2,000, payable in one year, with interest at seven per cent. per annum, according to the condition of a bond between the same parties at the same time. The bond and mortgage are in the ordinary form.

The answer avers that the bond and mortgage have been paid, and ought to be given up and canceled ; and in support of that averment, sets out that the complainants were organized as a corporation, under the general laws relating to such associations, and commenced business in February, 1868 ; that Pangborn then was, and has since continued to be, a member and the owner of ten shares of its stock ; that he paid all installments on his stock up to February, 1878, when all payments to the association of installments on stock and interest on loans, ceased by order of the board ; that in September, 1875, desiring to borrow

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\$2,000, he bought of the association, at a public auction, ten loans of \$200 each, at a premium of two per cent., in pursuance of his privileges as a member, and received from the treasurer the sum of \$1,960, and thereupon executed and delivered to the association the bond and mortgage in this suit; that the stock of the complainants consists of two series; that the ten shares owned by Pangborn are in the first series, and that the bond and mortgage so as aforesaid given by him are paid, because the said ten shares became paid up or closed in February, 1878, by the aforesaid action of the board.

The answer leaves it doubtful whether the shares in question did in fact become paid up; but, whether the shares were full or partially paid, the claim of the defendant is that the bond and mortgage should be treated as represented by such shares, and not as securities for the payment of money, according to their terms. It sets up an agreement between the defendant and the board of directors of the complainants essentially different from that expressed in the bond and mortgage, namely, that after the defendant had purchased the ten loans, in September, 1875, he stated to the board of directors that he desired to secure the same by giving to the association an ordinary bond and mortgage, instead of the bond and mortgage usually given by stockholders who were borrowers, upon condition that the directors would give him the same rights, privileges and advantages that would accrue to him if he should give for said loans the bond and mortgage usually given by stockholders in such cases; that said board of directors accepted his proposition and agreed with him accordingly.

It is clear, I think, from the answer and the testimony, that the mortgage sought to be foreclosed must be treated according to its terms. The defendant was the owner of ten shares of stock, and, at the time of the giving of the mortgage, one of the company's directors. He bid a bonus of \$40, and received the sum of \$1,960. The constitution and by-laws (a copy of which is in evidence) required him to give a bond and mortgage for the full amount of the loan, and also to assign to the association, for every loan of \$200, at least one share of stock as collateral security.

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They further required that interest should be paid monthly on the sum loaned, at the rate of one-half of one per cent. per month.

To secure loans so made, a certain special form of mortgage is shown by the evidence to have been taken from the company's members, adapted to the requirements of the by-laws, expressing by its terms that the shares of stock have been assigned as collateral security, and that the mortgagor shall go on paying interest, fines and other proper impositions, until each share of stock shall have become entitled, under the constitution of the association, to \$200. Instead of giving the customary mortgage and assigning his ten shares of stock, as other members were required to do, the defendant gave the bond and mortgage in question, and paid the interest for several years, half-yearly, down to about the time when the first series of shares are said to have closed.

The most favorable result for him of which the case admits, is to treat the loan as originally for the sum of \$1,960, regarding the transaction as one between an ordinary borrower and lender. The intention which existed at the time of bidding the bonus to take the loan as a member, must be regarded as having been subsequently changed, so that no corrupt or usurious agreement was entered into, and cannot properly be charged.

The agreement set out in the answer between the defendant and the board of directors, by which the defendant was to be allowed to retain his stock, to give a bond and mortgage, which should be more convenient to the defendant by concealing the true nature of the transaction, was an objectionable one, and entitled on no grounds whatever to be enforced in equity. It was not expressed in any writing, and is, besides, not proved by the evidence. In addition to this, the defendant was one of the board of directors, with whom he says the agreement was made.

It is needless to point out the indefensible nature of an arrangement made in that way, in opposition to the requirements of the by-laws, not allowed to other members, and by which a special advantage was to be given to one of the trustees, without authority or just consideration.

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The further defence of usury was hardly insisted on, nor the allowance of any set-off or credit for work. The only controverted matter was the alleged agreement in pursuance of which the mortgage was sought to be varied.

There should be a decree for the principal sum of \$1,960, with interest and costs.

Mr. Enos W. Runyon, for appellants.

Mr. Wm. B. Maxson, for respondents.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by Vice-Chancellor Dodd in the foregoing opinion.

WILLIAM S. SQUIER, appellant,

v.

MECHANICS NATIONAL BANK OF NEWARK, respondent.

Mr. John Lilly and *Mr. Cortlandt Parker*, for appellant.

Mr. John R. Emery, for respondent.

PER CURIAM.

This decree affirmed, for the reasons given by Vice-Chancellor Van Fleet in the case below. *Mechanics National Bank v. Burnet Manuf. Co.*, 6 Stew. Eq. 486.

For affirmance—DEPUE, DIXON, KNAPP, MAGIE, REED, SCUDDER, VAN SYCKEL, COLE, GREEN, WHITAKER—10.

For reversal—PATERSON—1.

Watson v. City of Elizabeth.

WILLIAM M. WATSON, appellant,

v.

THE CITY OF ELIZABETH, respondent.

Equity will not entertain jurisdiction to remove a cloud from the title of a lot, alleged to have been imposed thereon or threatened by a municipal assessment, (1) because complainant paid the assessment without knowledge of its illegality; nor (2) because the city has not repaid the excess over and above complainant's share of the improvement, as the city agreed; nor (3) because there was a misrepresentation by the city that the assessment, when made, was just and equitable.

Mr. George Putnam Smith, for appellant.

Mr. Frank Bergen, for respondent.

On appeal from a decree of the chancellor, on the following opinion.

THE CHANCELLOR.

The bill states that the complainant is the owner of a lot of land in the city of Elizabeth; that the charter of the city provides for the assessment of the costs and expenses of regulating, grading and paving any street or section of a street in the city, or grading, graveling, flagging, macadamizing, or otherwise improving any street or section of a street, upon the owners of land and real estate on the line of the street or section of the street so improved, and for enforcing payment by sale of the property for a term of years, as well as by suit against the owner; that an assessment of a specified sum of money was laid upon the complainant's property mentioned in the bill, for an improvement of part of a street on the line of which the property was situated, and that for non-payment of it the property was sold under the charter, and a certificate of the sale was given, which sale and certificate, the bill alleges, created a cloud upon the complainant's title.

Watson v. City of Elizabeth.

The bill further states that the city threatened to execute a declaration of sale, whereby the purchasers would have been, under the charter, lawfully entitled to hold and enjoy the land against the owner and all persons claiming under him; that under fear of such threats, and to remove the cloud on the title, the complainant paid to the defendants, on or about the 20th of December, 1872, the amount claimed to be due for principal and interest on the assessment, and that the complainant has requested the municipal authorities to examine into the benefit conferred on his land by the improvement, and to retain ~~so~~ so much of the money so paid by him to them as should be equal to the benefit, and return to him the rest.

The bill then avers that the money was paid with the understanding and on the agreement that the city should retain ~~so~~ so much thereof as it might be entitled to as the complainant's proper share of the cost of the improvement, and return to him the balance, if any there should be, and that he has requested the city to ascertain the amount chargeable to him for the benefits, and to account with him accordingly; but that it has refused to do either, and claims the whole of the money as its lawful and just due.

The bill contains further averment that after the improvement was completed the city directed the city surveyor to make an equitable and just assessment therefor upon the owners of lands on the line of the improvement, and an assessment having been made, the city represented to the complainant that the sum charged against him was, with interest thereon, a just and equitable assessment, and a fair proportion of the cost of the improvement, and the bill then avers that relying on such representation and statement, and induced thereby, the complainant paid the money, but has discovered that the representation and statement were untrue, and that the amount charged against him was not a just and equitable assessment, and that neither the city nor its agents ever attempted to make such assessment; that the money which he so paid was and is greatly in excess of a just and equitable assessment, and that the defendant refuses to make such an assessment or return any part of the money.

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The bill prays that the assessment may be judged to be illegal and void; that an account may be had of the payment and benefits, and that the surplus, if any, of the payment over the benefits, may be repaid to the complainant, with interest, and there is also the general prayer for relief.

The design of the pleader evidently was to present the claim of the complainant in three different phases, after the manner of the courts in a declaration in a suit at law. The first is, that it arose out of the stress of some illegal demand under which a cloud had been created on his title and an additional one was threatened. The second, that money was paid on an agreement to repay so much as should be in excess of the actual benefits; and the third that it was paid upon a misrepresentation that a just and equitable assessment had been made. It is merely a bill for relief against the assessment filed to obtain a return of part of the money paid. It was filed more than six years after the money was paid. It is almost needless to remark that if such a method of reviewing assessments and recovering back money paid on account of them is open to those who have in time past paid their assessments, an extensive field of litigation will have been discovered.

As to the first aspect of the claim, it presents nothing but the ordinary case of the payment of an assessment which the person assessed preferred to pay rather than litigate, or the case of payment of an assessment which the person assessed might have litigated successfully, but which, for want of knowledge that it was illegal, he did not litigate. If, under such circumstances, the money can be recovered back, there is no reason for a resort to equity; the remedy is at law.

As to the second phase, that there was an agreement that the city would return all the money paid over and above the complainant's share of the cost and expense of the improvement, it appears by the bill that the city did, in fact, make an improvement. The bill states that the property was sold under the assessment, and it prays that the assessment may be set aside as illegal and void. If there was an assessment, the claim for the excess (if any of the money paid was the amount of the assess-

Veghte v. Steele.

ment) is cognizable at law. But it is urged on this point, that though there was an assessment, it was not just and equitable. For this grievance, whatever remedy there is, is at law, and if the remedy at law be lost through laches there is no remedy in equity. *Lewis v. Elizabeth*, 10 C. E. Gr. 298; *Dusenbury v. Newark*, Id. 295.

The third aspect of the case is, under the averment, that there was misrepresentation that the assessment was just and equitable. This averment, like the others, was undoubtedly made with a view of enabling the complainant, under it, to contest the fairness of the assessment. But it is hardly necessary to say that this court will not enter upon the inquiry as to the fairness of a municipal assessment, whether it is just and equitable in its proportions, on the mere allegation that it is unjust and inequitable. *Liebstein v. Newark*, 9 C. E. Gr. 200; *Jersey City v. Lembeck*, 4 Stew. Eq. 238.

The demurrer will be allowed, with costs.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in the foregoing opinion.

JOHN V. VEGHTE, appellant,

v

WILLIAM G. STEELE, respondent.

Mr. A. A. Clark, for appellant.

Mr. J. J. Bergen, for respondent.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by Vice-Chancellor Van Fleet in the case below. *Gaston's Trust*, 8 Stew. Eq. 60.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY.

MAY TERM, 1882.

THEODORE RUNYON, Esq., CHANCELLOR.

 BRAHAM V. VAN FLEET AND JOHN T. BIRD, Esqs.
VICE-CHANCELLORS.

THE LEHIGH COAL AND NAVIGATION COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

An insolvent corporation had been in the hands of this court since 1876, and its railroad operated through a receiver appointed by the chancellor. The injunction restraining the managers of the corporation from interfering with or exercising the franchises of the company was modified in order to allow the stockholders to hold an election for directors, and thereunder certain stockholders made a written application to the existing board of directors to order an election of new directors, at the time designated by the by-laws for holding such annual election. This the directors refused to do. On application to the chancellor,—*Held*, that he might order an election of directors by the present stockholders, and so ordered; such election to conform as nearly as possible to the requirements of the by-laws of the company.

Lehigh Coal and Navigation Co. v. Central R. R. Co. of N. J.

Motion for an order for an election of directors of the defendant. On petition and supplemental petition of Edward C. Knight, who claims to be the owner of three thousand shares of the stock.

Mr. A. G. Richey, Mr. J. D. Bedle, and Mr. James E. Gowen, of Pa., for the motion.

Mr. T. N. McCarter, for certain stockholders, *contra.*

Mr. B. Williamson, for the directors.

THE CHANCELLOR.

After the making of the order modifying the injunction so to permit the stockholders to hold an election for directors, the petitioner, by written application to the existing board, requested them to order an election. They, however, declined to comply with the request. The order was made on the 15th of April last. The time fixed by the by-laws (the charter is silent on the subject) for holding the annual election of directors is the Friday next before the second Monday of May. Upon the refusal, certain of the stockholders gave notice, under the fifty-first section of the act concerning corporations, of the holding of an election. This court, for satisfactory reasons, prevented that election. A supplemental petition was then filed, setting forth the fact of the refusal on the part of the directors to hold an election, and praying this court to order the election, and motion is now made thereupon in behalf of the petitioner and other stockholders holding large amounts of the stock. The board appear by their counsel and submit themselves in the matter to the judgment of the court, declaring themselves ready to obey any order the chancellor may make in the premises. The application is opposed by certain of the stockholders on the ground that an election cannot legally be held, and that, if it can, this court has no power to order it.

The first objection, that an election cannot legally be held, is based on the eighty-third section of the act concerning corpora-

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ons, by force of which, it is insisted, the stockholders and directors are deprived of all power to hold an election. That section, as it stood before the amendment of 1877, provides that whenever an injunction shall have been granted against any incorporated company, in insolvency, as provided for by that act, and a receiver or receivers, trustee or trustees, shall have been appointed as also provided therein, and such injunction and appointment shall have continued for four months, it shall not be lawful for the stockholders or directors of the corporation, or any other person, to use or exercise the franchises of the corporation, or to transact any business in their name or by color of their charter, except such as may be necessary to collect their property and assets, and to sell the same, and distribute the proceeds among the creditors and stockholders of the corporation; and that for all other purposes the charter, by the injunction, appointment and continuance, shall be forfeited and void, without any further proceedings or judgment. By the supplement of 1877 (*P. L. of 1877 p. 74*) the section was amended by striking out the provision that for all other purposes the charter shall be forfeited and void, without further proceedings or judgment, and substituting therefor the provision that for all other purposes the chancellor may at any time, by order, in the suit or proceedings, with or without notice to anyone, and without any further proceeding or judgment, declare the charter forfeited and void; and it was also enacted that the charter of no corporation shall be forfeited and void, notwithstanding the injunction and appointment of receiver or receivers, trustee or trustees, shall have continued for four months; provided the corporation shall have been theretofore managed and doing business under an order of this court. The Central Railroad Company is within the proviso. It is argued, in opposition to this application, that while the supplement indeed provides that the charter shall not be forfeited and void, notwithstanding the provision of the eighty-third section of the original act, it does not relieve the stockholders and directors from the prohibition of that section which was in force against this company when the supplement was passed; for the injunction and appointment of a receiver had

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continued for over four months. And therefore, it is insisted, that by force of the prohibitory provision of that section they cannot lawfully use or exercise any franchise of the company, except for the purposes therein specified in that connection; which are the conversion and distribution of the property of the company, and that, therefore, they cannot lawfully elect directors.

To consider the objection: The legislature may waive a broken condition of a compact made with it. *Ang. & Ames on Corp.* § 777. By the act of 1877 the legislature has expressly and completely waived the forfeiture in this case. But further, it will be seen that the prohibition of the eighty-third section of the original act is, by its terms, not absolute, but partial only. Under that section, according to its terms, the exercise of these franchises is expressly permitted for the purposes of liquidation. The section expressly provides that the charter shall not be forfeited and void for those purposes; that is, that it shall not be absolutely void, but only so far as certain purposes are concerned. It follows that under the provisions of that section, without regard to the supplement of 1877, the organization may be kept up, and therefore that the election of directors is still lawful. If the stockholders may lawfully exercise the franchises for any purpose, it is obvious that they may lawfully select their agents to that end, and the directors are the agents. There is no warrant for holding that the stockholders can only exercise the franchises through the board that may happen to be in office at the expiration of the four months; for the section makes no such provision, and there is no reason to support any such construction. It might well be that by death, disability or resignation there would be no board at all, and it would then be necessary to elect one, or else the stockholders would be without agents to exercise the franchises, and therefore could not use them at all. It might happen that the existing board had ceased to be stockholders, and they might even have become antagonistic to the company. Justice demands that in the case of an insolvent corporation whose affairs are in the hands of this court for administration, the stockholders shall have the choice of the agents by

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whom the franchises are to be exercised, so far as this court permits such exercise in their behalf. It is clear that if the corporation exists though only for certain purposes, the stockholders may lawfully elect directors. The property in the hands of the court in this case, is valued at about \$50,000,000. By statute the court is required to operate the road for the benefit of the public. *Rev. p. 196 § 106.* And, without the statute, the same action would be taken in view of the obvious necessity of thus keeping the trust property in proper condition, and making it as productive as possible. There are many very important respects in which the action of the board as representatives of the company, may prove exceedingly useful to the court in administering the trust; and, in many of such matters, the future of the company, after it shall have passed out of the hands of the court, may be most materially affected by the action of the board. It is, therefore, eminently proper that the board should be the representatives of the stockholders, and therefore that a proper opportunity should be afforded to the latter to make selection of their agents. Moreover, should the court deem it advisable to turn over the property to the company, the stockholders must receive it by the hands of the board. Therefore, there must be directors; and in such case, as well as generally, the board should be the true and lawful representatives of the stockholders whose property they are to control and administer. No board has been elected since 1876. I have no doubt whatever that one may be now legally elected, and I am of opinion that such election should be held without any unnecessary delay. Under the circumstances, this court has power over the subject, and it is its duty not only to see to it that an election be held, but that it be so held and conducted as that it shall in all respects be legal. The action of stockholders before referred to in taking steps for an election under the fifty-first section of the act concerning corporations was objectionable, because it was taken without application to this court, which alone, under the circumstances, could take the measures necessary to secure fairness in the election, and obviate all reasonable cause of complaint on the ground of surprise. The circumstances were peculiar. The affairs of the

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company had for many years been in the hands of this court. There had been no election of directors by the stockholders since the insolvency was declared. The existing board disputed the power of the stockholders to hold the election. The proceeding was under a provision of the law, the applicability of which to an insolvent company, whose affairs were under the management of the court, was denied. It was quite evident that the election, if held under the circumstances, would be subject to imputations of surprise and unfairness, and to questions as to its validity, which would lead to litigation or induce this court to refuse to recognize it as a just and proper expression of the choice of the stockholders. Hence, it was not permitted to take place. The situation is now changed. The directors, who then declined to hold the election, now declare their readiness to hold it if this court shall so direct. The charter provides that if the election shall not be held on the day when, pursuant to that act, it ought to be held, it may be held at any other time. As before mentioned, it fixes no time, but the by-laws do. The election was not held on the day fixed. There was not time enough between the making of the order modifying the injunction and the time fixed by the by-laws to give the notice required by the by-laws, and besides, the directors declined to order an election at all on other grounds. I deem it proper to conform to the by-laws as nearly as practicable in holding the election. There will be an order that the directors hold it, fixing as early a day as practicable; the day to be named in the order. The election will be held and conducted in accordance with the provisions of the by-laws, as nearly as may be. The board will appoint the inspectors; the names of the persons appointed to be reported to this court at least ten days before the time fixed for the election. The transfer-book will be closed twenty days before the time fixed for the election. The receiver will be directed to facilitate the proceedings by permitting the use of the books &c. &c., and in every other way.

Lindsley v. Personette.

MORRIS B. LINDSLEY, administrator &c.,

v.

MARY H. PERSONETTE et al.

A testator gave to his wife, during her widowhood, a room in his dwelling-house and all the furniture she might require, and directed that his executors (his sons Stephen and Jephthah) should furnish her with everything necessary for her comfort during her natural life, and that in case they should refuse or neglect to do so, she should have "the privilege of choosing a person to act for her." Testator died in 1872, and his widow has continued to possess and live on his farm since then. Both of the sons, the executors, are dead, and complainant has been appointed administrator *cum test. an. de bonis non* of the testator. To a bill filed by him in this capacity, and on an allegation that the widow recently chose him to act for her under the will, averring that the means of support of the widow were insufficient, and praying that complainant might be authorized to sell some standing timber therefor, a demurrer filed by the widow and the administratrix of the surviving son and executor, was allowed, on the ground that complainant as administrator with the will annexed is not charged with the duty of securing for the widow of the testator the provision made for her by the will, and cannot sustain a suit brought in his name as her agent, for that purpose.—*Held* further, however, that the demurrer, being general, must be overruled, because complainant is entitled to an account (prayed by the bill) of the estate of his testator which remained in the hands of Stephen, the surviving executor, as against Stephen's administratrix; but, under the two hundred and tenth rule, the first-mentioned matter was struck out of the bill.

Bill for relief. On general demurrer.*Mr. T. Anderson*, for demurrant.*Mr. F. H. Pilch*, for complainant.

THE CHANCELLOR.

The bill is filed by the administrator *cum testamento annexo de bonis non* of Joseph Personette, deceased. It prays that his will be established and the trusts thereof performed and carried

Lindsley v. Personette.

into execution by and under the direction of this court; that an account may be taken of the testator's estate and effects not specifically bequeathed, and of his funeral expenses and debts, and of the legacies bequeathed by the will, and that the estate may be applied in payment of those expenses, debts and legacies, in a due course of administration, and the residue, if any, ascertained and distributed according to the will and under the direction of this court, and that proper directions may be given to the complainant as to his duty in providing for the testator's widow, under one of the provisions of the will by which the testator ordered and directed that his executors should furnish her with everything necessary for her comfort, during her natural life; and as to his duty touching the sale of the standing timber on the testator's land, and as to the sale of the land itself and the payment of legacies under the will, and that all necessary directions may be given to him touching the construction of the will and his execution of his trusts thereunder, and it prays for general relief. The bill states that the testator died in 1872. By his will, which is set out in the bill, he directed that his debts and funeral expenses be paid by his executors as soon after his decease as conveniently might be, and then gave to his wife, during her widowhood, a room in his dwelling-house and all the furniture she might require, and ordered and directed that his executors (his sons Stephen and Jephthah) should furnish her with everything necessary for her comfort, during her natural life, and that in case they should refuse or neglect to do so, ~~he~~ ^{she} should have the privilege of choosing a person to act for ~~her~~ ^{her}. He then gave to Stephen a lot of land of five acres and \$400, and another small legacy. To his daughter Catharine he gave, during her widowhood, a room in his house and the necessary furniture and a legacy of \$300, besides another small conditional one. He then gave to his son Jephthah all his real estate (except the five-acre lot) and all his personal property of every description. The bill states that Stephen and Jephthah proved the will, and in July, 1872, filed an inventory amounting to \$1,095; that they, as executors, had possession of all the personal property except the household furniture, and that ~~they~~

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paid the debts, which were but trifling, and the funeral expenses, and the legacy of \$400 to Stephen; that the testator left as his only next of kin and heirs-at-law, his widow, and his three children before mentioned; that Catharine died after her father's death, leaving one child, Anna L. Pryme, still living; that Jephthah died intestate and unmarried and without issue in July, 1873, and Stephen administered on his estate and filed an inventory in October, 1873, amounting to \$1,476.88; that the executors did not, nor did either of them, ever file any account or make any settlement of the affairs of the estate, and that those affairs are in great confusion; that Stephen took possession of all Jephthah's estate and paid Jephthah's debts, which were few and small, but never filed any account or made any distribution or other settlement of the estate; that Stephen died intestate in 1880, leaving as his next of kin his wife, two children by a former wife and two infant grandchildren, children of a deceased daughter; that his widow is his administratrix and his estate is insolvent; that the complainant was appointed in April, 1880, administrator *de bonis non* of Jephthah, and has realized from his property \$186.40, but can discover no other personal property; that the testator's widow recently chose him to act for her, as by the will she was authorized to do; that he has filed an inventory as administrator *cum testamento annexo de bonis non* of the personal property of the testator, consisting entirely of the household furniture and amounting to \$216.10; that he has no money of the estate, nor any personal property belonging to it, on which he can realize money or get credit, and that he cannot carry out his trust without the aid of this court.

The bill further states that the testator died seized of a farm of about seventy-four acres in Essex county, of which his widow is, and ever since his death has been, in possession; that she is eighty-nine years old and not in very good health, and lives in the dwelling-house on the farm, which was the testator's homestead; that she always regarded the provision which was made for her by her husband's will, as in lieu of her dower in his real estate, and accepted it as such accordingly; that the annual products of the farm are not sufficient to provide her with every-

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thing necessary for her comfort, and that it is necessary that some further provision be made for her; that there is a considerable growth of standing timber in good marketable condition on some parts of the farm, which, if it could be cut and sold, would provide the requisite means for at least two years to come, and that the farm itself can be sold in lots to good advantage.

The demurrer, which is general, and is filed by the widow and administratrix of Stephen, assigns for causes that the complainant as administrator with the will annexed, is not charged with the duty of securing for the widow of the testator the provision made for her by the will, and, as her agent, cannot maintain a suit brought in his own name to secure that provision for her.

The object of this suit is undoubtedly to obtain authority from this court for the sale by the complainant of the timber or land, or both, for the support of the testator's widow. As administrator with the will annexed, the complainant is not charged with the duty of providing for her support. The provision made for her by the will was a charge upon the executors (both of whom are now dead) and on the land devised to them. In order to secure it to her, the will provides that in case they shall refuse or neglect to furnish her with everything necessary for her comfort, she shall have the privilege of choosing a person to act for her; that is, that she may have some one to act in her behalf as her agent to compel performance. Obviously, any proceedings in this court in such case must be in her name, and not in that of her agent.

But beyond this, the complainant has a right to the account which he seeks of the administration of the estate of his testator by Stephen Personette, as executor, and so far he is entitled to relief. The demurrer is too extensive, and therefore must be overruled; but under the two hundred and tenth rule the matter pertaining alone to the relief, to which the complainant is by this decision held not to be entitled, will be struck out.

Herring's Case.

In the matter of the application of SARAH HERRING for sale of land limited over &c.

Where land limited over and charged with the support of A for life, includes old and dilapidated buildings, and has never produced enough to furnish a plain support for A, and to pay the taxes and assessments thereon, and the life-tenants are, through poverty, unable to pay such taxes and assessments, the fee in the land may be sold by order of the court, under the statute.

On exceptions to master's report.

Mr. W. M. Johnson, for exceptant.

Mr. A. P. Garrabrant, for petitioner.

THE CHANCELLOR.

The lands which the petitioner prays the court to order sold are property, the use of which was by her father's will given to her and her two brothers, Gilbert and Jacob, for the period of the life of their sister, Margaret, subject to and charged with the support of Margaret for life. After her death they are, according to the directions of the will, to be sold, and out of the proceeds are to be paid, first, two legacies to Jacob and the petitioner respectively, and then the balance is to be equally divided among all the testator's children then living, and the children, *per stirpes*, of any of them who may have died. The property consists of the homestead and two other lots of land in Hackensack, and two small lots of woodland elsewhere in Bergen county. Jacob is dead. The entire property is, and has been ever since the testator's death, productive of but little; not enough to furnish a plain support for Margaret and pay the taxes and the municipal assessments which have been laid on some of it—the land in Hackensack. The improvements on the latter land are, a very old dwelling-house on the homestead lot, and a small house on one of the other lots. The land in Hack-

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ensack has been sold for taxes, and there are other unpaid taxes and an assessment on the property, besides the taxes for which sale has been made. In view of the condition of the property and the inability of the life-tenants, from poverty, to pay the existing unpaid taxes and assessment, and those which may be assessed or imposed upon it, it would be wise and to the interest of both the present and future owners to sell it if a reasonable price can be obtained. Were it in the hands of an owner of the fee in such indigent circumstances as the life-tenants are, it would be judicious so to sell it. The master advises that such sale be made, recommends methods of sale and fixes prices for the Hackensack property. His advice and recommendation are judicious and the report should be confirmed. He fixes no price on the wood lots. They should be sold as soon as a fair price can be obtained. It may be that by the sale of the other property a sale of the homestead can be avoided. If so, it should be done. That is the most valuable part of the property, and there are family reasons connected with the support of Margaret, which appear to render it desirable that it should be kept unsold during her life, if possible.

WILLIAM W. HOYT and wife

v.

WILLIAM TUERS et al.

Abraham Tuers died intestate in 1850, seized of lands in Hudson county, and leaving six children and two grandchildren, his heirs-at-law. One of the sons, Abraham A. Tuers, left New Jersey in 1854, leaving his wife and children here, and never returned. For twenty years his family neither saw him nor heard from him, but heard that he was dead. In 1874 they ascertained that he was living in California, and one of his sons, William, saw him there. He died in 1877. In 1862, under proceedings in the orphans court of Hudson county, the lands of Abraham Tuers were partitioned, the heirs-at-law of

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Abraham A. Tuers being made parties thereto. On an allegation of his death intestate, and by sundry mesne conveyances thereunder, the defendants claim parts of the premises. In 1871, Abraham A. Tuers executed a conveyance in California in favor of Hoyt, the complainant, of all his property, real and personal, in New Jersey; and in July, 1874, another, conveying, *inter alia*, all his interest &c. as one of the children and heirs-at-law of his father and mother, or either of them; and in August, 1874, another, conveying, by specific metes and bounds, the lands set off to Abraham A. Tuers's heirs-at-law in the partition of 1862. On a bill for a partition, filed by Hoyt, in chancery, against the defendants as part owners of the premises, and also to set aside the partition of 1862, the defendants, by answer, set up that Abraham A. Tuers was, when he made the alleged conveyances to Hoyt, incompetent to make them, by reason of unsoundness of mind, and that they were obtained by fraud.—*Held*, that the complainant's title being denied, the suit would be stayed, to afford the complainant an opportunity to establish the title at law, and that although evidence was adduced in this cause on the subject of the defence to the deeds, the defendants were nevertheless entitled to try the question of the validity of complainant's title at law.

Bill for partition. On final hearing on pleadings and proof.

Mr. John J. King and *Mr. P. Woodruff*, for complainants.

Mr. Edward Q. Keasbey, for Newark Land Company and others.

Mr. G. W. Hubbell, for Francis Sipp and others.

THE CHANCELLOR.

The complainants seek to set aside a partition of land in Hudson county, made in the orphans court of that county in 1862, and to partition the property in this court. The wife joins her husband as complainant only in view of her claim of inchoate right of dower in the property to which her husband claims title. The land was owned by Abraham Tuers, who died in 1850 intestate. At his death his heirs-at-law were his six children and two grandchildren, the children of a deceased daughter. In 1862, application was made to the orphans court by his son William for partition of the property. From the order appointing the commissioners, it would seem that in his

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petition (it is lost, and no copy of it is produced), the petitioner stated that his brother Abraham (generally known as Abraham A. Tuers) was dead, and had died intestate, and that among his heirs-at-law were two minors, Andrew and Eliza Tuers, two of his children. The property was found capable of being partitioned without great prejudice to the interests of the owners, and was divided accordingly, and the partition confirmed. The persons to whom two of the shares were assigned in the partition, conveyed them to the Newark Land Company, and that company claims them, and also part of another of the shares conveyed to it in like manner. Abraham A. Tuers (son of Abraham) in 1854 left this state, leaving his wife and children here, and never returned to it. He went to California, and remained there up to the time of his death, which occurred in 1877. His son William having heard that he was in California, went there in 1874 and saw him there. William testifies that he neither saw nor heard from his father for twenty-two years after the latter left this state, and that the family had heard that he was dead. In March, 1871, Abraham A. Tuers executed a conveyance in California, in favor of Hoyt, for all his right, title and interest of, in and to all his property, real and personal, in New Jersey, and especially all his claims to the estate of his father and mother, or the estate of either of them. On the 1st of July, 1874, he executed a deed to Hoyt, by which, in consideration of \$1,000, as expressed in the deed, he conveyed a tract of land of one hundred and ten acres, or thereabouts, in this state, described in the deed as being situated in Morris county, about six miles from Morristown, and about three miles from Rockaway, and the same land occupied and possessed by the grantor in person, and by his family, and at that time occupied by William Tuers, his son. The deed conveyed, also, all other pieces, parcels, tracts, lots or bodies of land or real estate in New Jersey which he owned, or of, in or to which he had any kind, nature or character of right, title, claim or interest, legal or equitable, whether the same had been acquired by purchase, bequest, devise, descent or otherwise, and — also all the interest, right, title, claim and demand which he then — had or might thereafter have or be entitled to as one of the chil—

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dren and heirs-at-law of his father and mother, or either of them. In August, 1874, he executed another deed to Hoyt, which, after reciting that he had executed and delivered the deed of July preceding, and that it contained no specific or accurate description of any real estate, but did contain general and comprehensive reference to the grantor's real estate in this state, and that he intended thereby to convey to Hoyt the land thereafter more specifically described and bounded, conveyed to Hoyt, for a nominal consideration, the land set off in the partition as the share of his, the grantor's, heirs-at-law, and nothing more. William M. Tuers testifies that, when he went to California, he reached Sacramento City June 29th, 1874, and left there for home on the 4th of July following. He says that he told Hoyt and Hoyt's lawyer and his father, while he was there, that the partition had taken place. Hoyt alleges that the description of the share was inserted by mistake—that it was supposed to be the description of the whole of the land in Hudson county of which Abraham Tuers, his grantor's father, died seized. The answering defendants object to the bill as being multifarious, inasmuch as it seeks, as they insist, to rectify the alleged mistake in the last-mentioned deed, and also to set aside the partition in the orphans court, and obtain a new one. It is enough to say, on this point, that were the objection well founded, it would, in this case, come too late, since it was made for the first time at the final hearing. It is not well founded, however. The bill does not pray a reformation of the deed. But, without considering any of the other objections made by the answering defendants to a decree for partition, it is sufficient at this stage of the proceedings to say that the complainant's title, which is a legal one, is disputed; and it is an established rule of this court that where the title of the complainant in a partition suit is disputed (unless it is an equitable one), this court will not settle it on the hearing, but will compel the complainant to establish it at law first, and the bill will be retained until he shall have so established it. The land company, by its answer, expressly denies the validity of the deeds to Hoyt, and avers that the grantor therein was, when they were executed, in-

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competent to make them, by reason of unsoundness or feebleness of mind, and that they were obtained by fraud; and other answering defendants, in like manner and by like averments in their answer, assail and deny the validity of Hoyt's title. Those answers contain a direct denial of the complainant's title. It is urged, on behalf of the complainants, that the proof by no means supports those averments, or either of them. But the answering defendants are entitled to the benefit of the application of the rule just stated. They were not required to produce their testimony here on the subject of the invalidity of the title set up by the complainants. The suit will be stayed to afford the complainants an opportunity to establish their title at law.

JAMES MCFILLEN

v.

EDMUND HOFFMAN and wife et al.

The defendant owned a lot of land, and his wife an adjoining lot. They gave a bond and mortgage covering both lots, but the wife was only a surety therein. With the money obtained from the mortgage the husband finished a row of four houses, which were being built on part of the premises when the mortgage was given; one of these houses stood entirely on the wife's lot. On foreclosure of the mortgage,—*Held*, that while the wife's right as surety must be recognized and protected, yet, as to an execution creditor of the husband, she was a principal so far as any of the money borrowed on the mortgage had been applied to the erection of the house on her lot; and a reference was ordered to ascertain the amount.

Bill to foreclose and cross bill. On final hearing on pleadings and proofs.

Mr. A. Hugg, for complainant.

Messrs. Jenkins & Jenkins, for Mrs. Hoffman.

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THE CHANCELLOR.

On the 12th of October, 1875, Edmund Hoffman was the owner of a lot of land in Gloucester City, fronting on Powell and Market streets, forty feet on each street, and one hundred and thirty-six feet in depth. His wife owned a lot adjoining it, of the same depth, and fourteen feet front on each of those streets. He then borrowed \$2,000 from the Camden Mutual Insurance Association, and secured the repayment thereof by the bond of himself and wife of that date to the association, payable in one year from that time, with interest, and a mortgage upon the two lots of land above mentioned, which were described as one lot, and as the same premises conveyed to him by a certain deed and part of the property conveyed to her by a certain other deed. At the time of giving the mortgage he was in possession of the whole property, and was improving it by building on part of it. It appears to have been vacant when he began to build on it. When the mortgage was given he was building on the Powell street end four houses, which covered all that end of his lot and twelve feet (all but two feet—probably left for an alley) of that end of his wife's lot. These houses cost him \$1,000 apiece. After the mortgage was given, he finished them and built two other houses on the Market street front of the property. They cost him \$3,500. On the 19th of September, 1876, the mortgagees, at his request and for his accommodation merely, released to him and his wife the half of the lot which fronted on Market street. His object in obtaining the release was to borrow money by mortgage of the released portion of the property. In October, 1877, the sheriff of Camden county conveyed the remainder of the mortgaged premises to the defendant Owen Smith, pursuant to sale under an execution at law in his favor against Hoffman; and in the same year, the mortgagees assigned the mortgage to the complainant. The complainant filed his bill to foreclose, and Mrs. Hoffman having answered it, filed a cross-bill in which she alleged that she was a mere surety for her husband in the bond to the insurance association; that by the mortgage her property was mortgaged merely as collateral security for his debt, as the association knew,

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and that she neither knew of, nor consented to, the release when it was made; and praying that the bond may be declared void as to her, that that part of the unreleased portion of the mortgaged premises to which her husband had title be sold before her land, and that before selling her land the value of that part of her husband's land which was released, be credited on the amount due on the mortgage; and further, that the sheriff's deed to Smith may be declared null and void, so far as her land is concerned.

The only subject of discussion at the hearing, and the only matter submitted for decision, is what, under the circumstances, are her rights under the mortgage. It is admitted that the mortgagees knew when the mortgage was given, that she was thereby mortgaging her separate property for the payment of the mortgage debt. And it is settled law that where a wife pledges her separate estate for her husband's debt, she is entitled to the ordinary rights and privileges of a surety. It appears that the loan was negotiated by Hoffman, and on his own account. He says that the secretary of the mortgagees with whom, as their agent, the business seems to have been transacted, assured his wife that her property would be held only as collateral security. This is not denied, though there is an answer by their secretary in his testimony which may have been, and probably was, intended as a denial of the truth of this assertion. It appears, however, by the testimony of Mr. Hoffman, that the mortgage money was borrowed for the purpose of making the improvements—erecting the buildings—on the whole property. At the time when the mortgage was given, the houses on the Powell street end of the property were in the course of construction. They were a row of four houses built together; and they covered not only his lot, but also all his wife's lot except two feet, probably, as before suggested, reserved for an alley or passage-way. These houses seem to have been thirteen feet wide, and one of them appears to be almost entirely (twelve feet in width of it) on her lot. Hoffman testifies that at the time he procured the loan the Powell street houses were in course of completion, but that the Market street houses had not yet been commenced; that it wa

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all one "business operation," and that the Powell street houses are all in one row, and were all built at the same time and cost \$1,000 apiece. He also testifies that he borrowed the money for which the mortgage was given, in order to make those improvements. It does not appear what part of the money, if any, went into the house built on Mrs. Hoffman's property, but it does appear clearly that a house which cost \$1,000 was built by her husband almost entirely on her lot on Powell street, and that her property has the advantage of the improvement. Her husband says the money was borrowed to make this and the other improvements on the whole property. It does not appear, it may be remarked, what money of his was spent in improving her part of the Market street end of the property. She now claims that she is a mere surety, and asks to be dealt with as such. But the money was borrowed for the improvement of her property, as well as that of her husband, and she ought to respond as a principal to the extent of the cost of the improvements made with the mortgage-money on her lot. In *Dickinson v. Codwise*, 1 Sandf. Ch. 214, where a husband borrowed money on his bond and a mortgage made by him and his wife of her separate property, and the borrowed money was employed by the husband in paying for permanent and valuable improvements put by him on her separate property, or in repaying money which had been previously borrowed and used for the purpose, it was held that, under the circumstances, the debt was in equity hers, so far as it went to or for the improvement of her separate estate. In the case in hand there must be an inquiry on this point, to ascertain whether Mrs. Hoffman's lot is in equity chargeable with any part of the mortgage money, and if it shall be found to be so chargeable, to that extent she will be held to be a principal and her lot liable accordingly. To that extent the equity of Smith, the purchaser of Hoffman's interest in the Powell street property, at the sale under the execution at law, is superior to hers. Beyond that, she is not liable; for her equity is superior to his, and his land (that to which Hoffman himself had title) is to be sold to pay the complainant. The value of the released portion is, I assume, such as to quite equal the bal-

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ance which will be due on the mortgage after applying the proceeds of the sale of the land owned by Smith. The complainant is entitled to his costs, of both the original suit and the cross-suit. The latter was not, it may be remarked, necessary to the defence of Mrs. Hoffman. The complainant in the cross-bill is entitled to costs of that bill as against Smith, for the bill was necessary as against him to reform his deed, which included in its description her property.

ABRAHAM T. DICKERSON

v.

JOHN H. WENMAN and wife et al.

A mortgage absolute on its face, assigned by the mortgagee to the holder as collateral security, may be shown, on foreclosure, to have been originally given as a collateral mortgage, but this defence not being responsive to the bill, must be established by other evidence than the answer on oath of the mortgagor. In this case, the bill prayed answer on oath.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. E. D. Halsey, for complainant.

Mr. A. Mills, for Wenman.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage given by the defendants John H. Wenman and wife, to Thomas E. Allen, on land in Morris county. The mortgage is dated May 31st, 1877, and was recorded on the 11th of June following. It was made to secure the payment of \$1,000 in one year, with interest at seven per cent. per annum, according to the condition of Wenman's

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ond to Allen, of the same date. Allen assigned the bond and mortgage to the complainant, May 17th, 1879. He assigned it as executor of Jacob Tomkins, deceased, and in the deed of assignment, stated that, though the mortgage was made to him in his own name, as an individual, it was really given to him as executor of Tomkins. The assignment was not absolute, but as collateral security for the payment of Allen's note of that date, for \$500, to Dickerson. The bill alleges that the consideration of the mortgage was paid by Allen as executor of Tomkins, and that the money due and to grow due thereon belonged to the estate. Allen is dead. He died in June, 1880. The only answer filed in the cause is by Wenman, and that, according to the requirement of the bill, is under oath. By the answer, he alleges that the statement of the bill, that the consideration of the mortgage proceeded from the estate of Tomkins, is untrue, and that the mortgage was given merely as collateral security for the payment of a debt due from him to Allen, individually, the principal of which amounted to \$655.26, and for which Allen held his three promissory notes, one dated April 28th, 1876, for \$100; another dated May 10th, 1876, for \$400, and the third dated April 10th, 1877, for \$155.26, the payment of the first two of which was already secured by a chattel mortgage from him to Allen. The answer further states that the chattel mortgage (which was given May 10th, 1876, to secure the payment of those two notes) was renewed May 8th, 1877, and again on May 8th, 1878, and that on January 29th, 1879, a new one was given to secure the payment of all three of the notes, and that it was renewed in January, 1880, and was paid off, the last payment on it having been made in June, 1880.

The consideration of the mortgage in suit may be inquired into for the purpose of ascertaining whether anything is due upon it. It is urged in behalf of Wenman, that his answer is evidence for him on that head. While the general rule is that the answer of a defendant (answering on oath pursuant to requirement in the bill) is evidence for the party, so far as it is responsive to the bill, the rule has its limits and exceptions, and where the answer asserts a right affirmatively, in opposition to

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the complainant's demand, it is no evidence. *Fisler v. Porch*, 2 Stock. 243; *Hart v. Ten Eyck*, 2 Johns. Ch. 62. It is a settled rule that matter set up in the answer, in avoidance of the complainant's claim, is not proved by the answer. *Neville v. Demeritt*, 1 Gr. Ch. 321; *Fey v. Fey*, 12 C. E. Gr. 213.

The admission of Wenman, in his answer, that he gave the mortgage, is evidence against him, but his allegation made in opposition to and in avoidance of the complainant's claim, that he gave it merely as collateral security, is not. The rule on the subject is clearly and comprehensively stated as follows:

"Where the answer of the defendant is not responsive to the bill, or sets up affirmative allegations of new matter, not stated or inquired of in the bill, in opposition to or in avoidance of the complainant's demand, and is replied to, the answer is of no avail in respect to such allegations, and the defendant is bound to establish them by independent testimony." 1 Dan. Ch. Pr. 844 n.

Nor has Wenman proved the defence. His testimony is unreliable, and not only contradictory of the answer, but is self-contradictory. Not to speak of his testimony as to the consideration of the notes, the payment of which was secured by the chattel mortgages, it is clear that he is in error when he testifies that there was no subsequent indebtedness from him to Allen, for the contrary is proved by the three notes produced in evidence, amounting to \$530.18, one of which is dated July 10th, 1877, and the other two in January and November, 1878, respectively. And there is proof that Allen paid usury for him, in considerable sums, after the giving of the mortgage in suit. Wenman, in his testimony, swears that the mortgage was not given to secure an existing indebtedness from him to the estate of Tomkins, and there is reason to believe that the statement is true. The bond and mortgage made, as they are, to Allen individually, and not as executor, furnish some corroboration of his statement. The probability is that the mortgage was given to secure not only the notes mentioned in the chattel mortgages, but also other future indebtedness, which Wenman might incur to Allen, by the latter's advancing or paying money to or for him, or in settling claims which others had against him. It

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may well be that the money that was lent or paid by Allen to or for Wenman belonged to Tomkins's estate, and that Allen therefore recognized its title to the bond and mortgage. In the absence of proof justifying the exclusion of any part of the indebtedness from Wenman to Allen, which they represent, the mortgage should, under the circumstances, be held to be security for the three notes of \$163.62, \$200.68, and \$185.88, respectively, and the interest thereon. The sum of \$31.36 appears, by endorsement on the bond, to have been paid for interest, on the 12th of November, 1878, and to have been in full for interest thereon to that date. It will be taken to be in full payment of the interest on those notes to that time. There will be a decree for complainant, according to these views.

MARY L. LAWRENCE

v.

FRANK M. HOUGH.

In 1863, two adjoining lots were owned by M., on one of which he had erected a three-story brick store-house, whose eaves projected about two feet over the adjoining lot, which was then vacant. In 1863, M. sold and conveyed the vacant lot to F., by this description: "Beginning at the west corner of the brick store-house of the said M., * * * and running thence north, fifty degrees west, passing close along the northwest side of the said brick store-house, sixty-five feet, to the northeast corner of said store-house; thence" &c., with this right: "Also the right and privilege to the said F. to join to and build into the wall of the brick store-house of the said M., when erecting a building on the lot hereby conveyed, doing no unnecessary damage to the said brick store-house." In 1869, F. erected a *two-story* brick building on his lot, and the same year sold it to H., with the party-wall privilege, and H. sold it to defendant, with the same privilege. M. sold his store-house and lot, in 1872, to S., expressly subject to the party-wall privilege, and through S.'s devisee complainant claims.—*Held*, that defendant was, by the construction of the description in the deed, by the privilege of building a party wall, contained in the deed, by the measurements necessary to give the lot its full

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width, as stated in the deed, by the location of F.'s building in 1869, and its peaceable occupation since, and by the absence of irreparable injury to the complainant, entitled to cut off the eaves of complainant's building so far as their projection over his lot interfered with his raising his own building.

Bill for relief. On final hearing on bill and answer.

Mr. M. Rosenkrans, for complainant.

Mr. H. Huston, for defendant.

THE CHANCELLOR.

The bill is filed for an injunction to restrain the defendant, who is the owner of a lot of land in Newton, adjoining a lot owned by the complainant, from interfering, in building on his lot, with the eaves of the store-house on the complainant's lot, which overhang the defendant's lot for the distance of about two feet. In 1863, the two lots were owned by John McCarter, and on that which now belongs to the complainant he had before then erected the store-house thereon, which was then standing. It is of brick, and of the height of three stories. In that year he sold and conveyed in fee to James G. Fitts the lot now owned by the defendant (which was then vacant), by the following description :

"Beginning at the west corner of the brick store-house of the said John McCarter, standing on the corner of Spring and Moran streets, and running thence north, fifty degrees west, passing close along the northwest side of the said brick store-house, sixty-five feet, to the north corner of said store-house; thence north, forty degrees west, twenty-five feet nine inches, to a point in the line with the northeast side of Oliver D. Reeves's lot; thence south, fifty degrees west, sixty-five feet, to the northeast side of Spring street; and thence south, forty degrees east, twenty-five feet nine inches, to the place of beginning."

The deed also grants the following right :

"Also the right and privilege to the said James G. Fitts to join to and build into the wall of the brick store-house of the said John McCarter, when erecting a building on the lot hereby conveyed, doing no unnecessary damage to the said brick store-house."

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In 1869, Fitts erected a two-story brick building on his lot. He sold the property in that year (the deed including the party-wall privilege) to Seely Howell, who, in 1871, conveyed it, with the same privilege, to the defendant. The complainant's lot, in 1872, was conveyed by McCarter to Jacob L. Swayze, now deceased, who devised it to his wife, who, as executrix, conveyed it to the complainant. By the deed to Swayze, McCarter conveyed the property expressly subject to the party-wall privilege. The defendant has begun the work of raising his building, and threatens and intends in so doing to cut away the eaves of the complainant's building (the store-house) which overhang his lot, as it will be necessary for him to do in order to raise his building in accordance with his design. He has given due notice of his intention, and there is nothing in his manner of doing the work, if his right to cut off the eaves is established, to call for the interference of this court. To consider his right in the premises: The conveyance by McCarter to Fitts was of a lot bounded on the easterly side by the wall of the store-house of the former. The line passes "close along the northwest side of the store-house." If there were any question as to the grantor's intention to include, by that description, the land covered by the eaves, it would be removed by the fact that, in the same deed, he grants to Fitts the right and privilege of using the wall of his store-house as a party-wall. To avail himself of that right, Fitts must, of course, build up to the wall; so that it is obvious that McCarter intended to convey to Fitts the land covered by the eaves. It is admitted that the measurements of the front and rear, called for by the description, cannot be obtained unless the wall itself be held to be the easterly line of the lot; and that, if it be, they are exactly answered. Besides these considerations, there is still another very important one; that is, actual location. Fitts's building was built on his lot up to the wall of McCarter's store-house, in 1869, and he and his grantees have occupied the lot conveyed to him, according to their present claim, ever since, without dispute. The conveyance to Fitts was made less than twenty years ago, and there is no ground for any claim by prescription for the eaves, and none is made. The

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right to use the wall as a party-wall is accompanied with what is equivalent to a covenant that the grantee shall, in building, do no unnecessary damage to the store-house on the complainant's lot. That provision is relied on by the complainant as being some evidence, at least, that the conveyance was not intended to include the land covered by the eaves. But it not only does not prove that, but, if it proves anything, by fair implication, on the contrary, it contemplates the doing of whatever injury may be necessary. The defendant's right to do what, according to the pleadings, he threatens, is clear. But, further, it may be added, if it were not so, there is no reason for the interference of this court. There is no ground for the claim that the cutting off of the eaves as threatened will do an irreparable injury. On the contrary, it is quite apparent that the injury will not be so by any means, or in any sense. The injunction will be denied and the bill dismissed, with costs.

JOB S. CRANE, surviving executor &c. of Jane J. Ogilvie,
deceased,

v.

WILLIAM A. HOWELL et al., executors &c. of Charles J.
Howell, deceased.

An executor invested funds of the estate in a second mortgage on lands in this state and in an unsecured promissory note, both of which proved to be worthless, and a total loss to the estate. The executor not only admitted his liability to the estate for these investments, but repeatedly promised to indemnify the estate therefor.—*Held*, in a suit by his co-executor against his executors and legatees, that the latter were liable for the amount of those investments.

Bill for relief. On final hearing on pleadings and proofs.

Crane v. Howell.

Mr. C. T. Glen, for complainant.

Mr. R. E. Chetwood, for defendants.

THE CHANCELLOR.

This suit is brought by Job S. Crane, as surviving executor of the will of Jane J. Ogilvie, deceased, against the executors and legatees of Charles J. Howell, the deceased executor, to recover the amount of a loss sustained by the estate in and by two investments made by Howell of moneys of the estate. One of the investments was of \$3,000, and was upon second mortgage of land in Newark, and the other (\$500) upon a promissory note without any security. The mortgage he took by assignment from his brother, William A. Howell. It is admitted that these investments have proved a total loss, and it is not denied that they were such as are not allowable for trust-money. The liability of the estate of the deceased executor is not disputed, but it is insisted that while the complainant, indeed, was not aware of the making of the investments in question, nor of the intention of Howell to make them, yet as to the investment on the bond and mortgage, he was subsequently informed of it, but took no steps in reference to it, and that he therefore is equally liable with the estate of Howell for the loss upon that investment, and is bound to contribute his equal share to pay it. There is no ground for this claim. The proof is that Howell not only recognized his liability to pay any loss which might be sustained on the investment on the bond and mortgage, but repeatedly promised to indemnify the estate against it. The investment on the promissory note (the note, it may be remarked, was made payable to Howell alone as executor) was not discovered by the complainant until a long time after it was made, but at what particular time does not appear. It was the duty of the complainant on becoming acquainted with the fact that Howell had made the investments in question, to require him to indemnify the estate against loss by reason of them. *Crane v. Hearn*, 11 C. E. Gr. 378 ; *Laroe v. Douglass*, 2 Beas. 308. That he delayed doing so until Howell died, obviously constitutes no

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ground for compelling him, as between him and Howell's estate, to bear part of the loss. There will be a decree against Howell's executors for the amount of the loss and interest. By their answer it appears that they have retained in their hands of the funds of the estate applicable thereto, enough to meet any liability in the premises which might be established against them in this suit.

ELISHA MUNSON

v.

JACOB R. BERDAN, executor.

A testator gave to his wife \$14,000, "to be by her used during her natural life at her pleasure, hereby giving her power * * * to appoint the same among my legatees, by will, after her decease, according to her judgment and discretion;" otherwise to his legatees "in proportion to the legacies bequeathed by this my will."—*Held*, that her will bequeathing exactly the \$14,000 among her husband's surviving legatees was a good execution of the power, although the will contained no direct reference to or express recital of the power.

Bill for construction of will. On final hearing on bill and answer and stipulation of counsel.

Mr. Z. M. Ward, for complainant.

Mr. W. Pennington, for defendant executor.

THE CHANCELLOR.

Ira Ryerson, deceased, by his will dated January 8th, 1873, bequeathed as follows:

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"I also give to my said wife, and direct my executors to pay to her, the sum of \$14,000, to be by her used during her natural life at her pleasure; hereby giving her power to invest and re-invest the same in her own name in the same manner as I might do if living, and to appoint the same among my legatees by will after her decease, according to her judgment and discretion. But should the sum of \$14,000, or any part thereof, remain undisposed of by my said wife as aforesaid at the time of her death, I give and bequeath the whole or part thereof, as the case may be, so undisposed of by my said wife, to my legatees in proportion to the legacies bequeathed by this my will."

His legatees were his brother, Hassel P. Ryerson, and Hassel's wife, and their daughters, Orilla and Elizabeth; the children of his deceased sister, Patience Munson; his half-sister, Sophronia, and her husband, Elisha Doty, of Ohio; his half-sister, Lavinia, wife of John Beekman, of Ohio; his half-brother, Hurlburt Carpenter; the heirs of his half-brother, Deming Carpenter, "had by his first wife;" Richard Van Houten; Jane and Gertrude Van Houten, daughters of Richard; Abraham P. Ryerson; Gertrude and Ira Ryerson, children of Abraham; Catharine, daughter of Amos Ryerson; Gertrude Holbert; Ira Ryerson Van Houten, son of Adrian Van Houten; Abraham Doremus; the Board of Foreign Missions of the Reformed (late Dutch) Church; the General Synod of the Reformed Church, and the Paterson Orphan Asylum and the Ladies' Hospital Association. The \$14,000 were paid over to the widow pursuant to directions sought from this court (*Matter of Executors of Ryerson*, 11 C. E. Gr. 43), and were held by her up to the time of her death. By her will, dated March 15th, 1878, drawn by herself, she gives to the surviving legatees of her husband, Ira Ryerson, legacies amounting altogether to the sum of \$14,000, and the question is whether they are so given in execution of the power of appointment given in her husband's will. I am of opinion that they are. Those legacies are grouped together in

NOTE.—The execution of a power may be valid, without an express reference thereto, *Den v. Crawford*, 3 Hal. 103, 2 Jarm. on Wills *676; *Lancaster v. Dolan*, 1 Rande 231; *Andrews v. Brumfield*, 32 Miss. 107; *Gould v. Mather*, 104 Mass. 290; *Bishop v. Remple*, 11 Ohio St. 277; *Heyer v. Burger*, 1 Hoff. Ch. 1; *Porcher v. Daniel*, 12 Rich. Eq. 349; *Owen v. Ellis*, 64 Mo. 77. See *Holt v. Hogan*, 5 Jones Eq. 82; *Foos v. Scarf*, 55 Md. 301; *Hollister v. Shaw*, 46 Conn. 248.—REP.

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the will and amount to the sum of \$14,000 precisely. That they are given by her in execution of the power to appoint conferred on her by her husband's will, is further evident from the fact that in the gift to her husband's half-sister, Sophronia Doty, she refers to her as "surviving legatee." By Mr. Ryerson's will he gave a legacy to Mrs. Doty and her husband. The latter died after the decease of Mr. Ryerson, and was dead when the testatrix made her will. That reference is obviously to Mr. Ryerson's will, and the gift by the testatrix to Mrs. Doty is therefore to her expressly as surviving legatee accordingly. Moreover, there is some evidence in the fact that she gives a legacy to Laura Munson, who was the daughter of Ira Munson, one of the children of the testator's sister Patience. The testator by his will gave legacies to "the children" of Patience, and Ira, who was one of them, predeceased him. It was held in this court that under the will Laura took by substitution in place of her father. Hence, apparently, the legacy to her in the testatrix's will. There are other evidences in the will that it was the intention of the testatrix, in these legacies to the legatees of her husband, to execute the power of appointment given to her by his will. The testatrix indeed does not, except in the legacy to Sophronia Doty, refer to her husband's will, but it is not necessary that under such a power of appointment the intention to execute the power should appear by express terms or recitals in the instrument—it is sufficient if the act shows that the donee had in view the subject of the power. *4 Kent's Com.* 334, 335; *Sudg. on Pow.* 257; *2 Washb. on Real Prop.* 658; *Blagge v. Miles*, 1 Story 426; *Cueman v. Broadnax*, 8 Vr. 508.

The legacies given by the testatrix to the surviving legatees of her husband together amount, as before said, to the \$14,000 exactly. One of the legatees of her husband died after the testatrix's death and before the making of the testatrix's will, and she gives the whole fund to the survivors. This execution of the power of appointment is a good and complete one. *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 299; *Butcher v. Butcher*, 1 Ves. & B. 79; *Perry v. Meddowcroft*, 4 Beav. 197; *Paste v. Haselfoot*, 33 Beav. 125.

Lehigh Coal and Navigation Co. v. Central R. R. Co. of N. J.

THE LEHIGH COAL AND NAVIGATION COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

In 1872, certain lands covered by mortgages were condemned for the use of a railroad, without the mortgagees having been made parties thereto, and the entire amount of the award (\$6,500) was paid to the mortgagor, who was then in possession. The railroad company afterwards became insolvent, and a receiver therefor was appointed by this court. When the mortgages were foreclosed, the receiver intervened in order that the decree of sale might provide for exhausting the other lands covered by the mortgages before resorting to those condemned, and it was so ordered. At the sale it was found necessary, in order to satisfy the mortgagees, to sell also the lands condemned, and they were bought by the mortgagees for \$5,000. The receiver then instituted proceedings to condemn the lands anew, and on petition by the mortgagees to restrain such proceedings, and for the payment to them of the amount of the award of 1872, by the receiver,—*Held* (1) that the mortgagees had, by purchasing the lands, defeated the title of the railroad company thereto, and the fact that they had been the mortgagees of the premises gave them, after their foreclosure purchase, no other or better standing than any other purchaser, with reference to the condemnation proceedings and award of 1872. (2) That as the affairs of the company were now in the hands of the court for administration and management, and the court was not satisfied that the course proposed by the receiver was the best or most judicious one for obtaining title to the premises, the receiver should be directed to report, for the information of the court, his reasons for proceeding with a new condemnation.

On petition and answer.

Mr. T. N. McCarter, for petitioner.

Mr. B. Williamson, for respondent.

THE CHANCELLOR.

The petitioner, the Union National Bank of Rahway, applies for an order restraining the Central Railroad Company of New Jersey and the receiver thereof, from continuing proceed-

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ings recently begun by the latter for the condemnation of certain land in his possession, and directing the payment to the bank of the amount awarded for the land in certain previous proceedings for condemnation. The claim to this relief is based on the following state of facts: The land in question was in 1872 part of a tract then owned by Moritz Pinner. The tract was then subject to certain mortgages thereon. In the spring of that year proceedings were taken by the Perth Amboy and Elizabeth Port Railroad Company to condemn the land in question, which resulted in an award made in March of that year of \$6,565.35 for the value of the land and damages, and thereupon that company entered into possession and built its road on the land, which has ever since been occupied by it and its successor, the Central Railroad Company, which in 1873 was merged in and consolidated with it. In May, 1873, Pinner conveyed the land in question to the Perth Amboy and Elizabeth Port Railroad Company by deed. In subsequent foreclosure proceedings in this court, on one of the mortgages, a decree was made directing the sale of all the mortgaged premises; but in such order, however, that all the rest of the premises was to be sold to pay the amount due on the mortgages before the railroad land, which was only to be sold in case of deficiency. At the sale under the execution, which took place November 1st, 1881, the rest of the property (it was bought by the bank) did not bring enough to satisfy the mortgages and the railroad land was then sold, and was bought by the bank at the price of \$5,000. The sheriff, in pursuance of the sale, conveyed the whole property to the bank by deed dated November 14th, 1881. Shortly thereafter, the bank demanded of the receiver possession of the land held by him, but he refused to comply, and soon afterwards took steps to condemn it. The petition sets forth the fact that the then receiver of the Central Railroad Company intervened in the foreclosure proceedings for the purpose of obtaining such modification of the decree as to provide for the sale of the railroad land only in case of deficiency of the proceeds of the rest of the property to satisfy the mortgages, and the petitioner claims that thereby the rights of the company in the matter were submitted

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to the adjudication of this court thereon. The petitioner states that it is satisfied with the award made in 1872, and claims that it should be paid over to it.

The mortgagees appear not to have been parties to the condemnation proceedings of 1872. The whole of the amount awarded was paid over to Pinner, who was then in possession. The bank is before the court as a purchaser of the land, and has the same and no other rights that any purchaser, not a mortgagee, would have. By the sheriff's sale the company lost its legal title to the land. The intervention by the receiver was merely for the purpose of securing a modification of the decree, in accordance with equity, to which, as a purchaser of the land from Pinner, the company was clearly entitled, and obviously any purchaser in the same situation would have been entitled to the same relief. This court has obtained no control over the subject thereby, which it would not have had without such intervention. The bank having now acquired title to the land, by purchase under the foreclosure sale, may ask this court to give it possession, and the receiver will be required to surrender the property unless he pays its value. That value may, in order to secure the rights of the company, in view of the fact that it took possession under proceedings in condemnation, and has built its road on the land, be fixed as of the time when it took possession. *N. H. C. R. R. Co. v. Booraem*, 1 Stew. Eq. 450; *Price v. Weehawken Ferry Co.*, 4 Stew. Eq. 31; *N. Y. & G. L. R. R. Co. v. Stanley*, 8 Stew. Eq. 283.

The company may, indeed, abandon its claim equitable as well as legal, to the road, and in that case the value should be fixed as of the date of the sheriff's deed, and it may be ascertained by proceedings for condemnation, or in this court. The mortgagees were not affected by the former proceedings for condemnation, and it was therefore their right to have the land sold, if necessary, to pay their mortgages, but having sold the land, they obviously have no claim to the money awarded in those proceedings.

It is suggested that the principle of the decision in *Platt v. Bright*, 4 Stew. Eq. 81, is applicable. In that case, indeed, the claim

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of the mortgagee to money awarded in condemnation proceedings to which he was not a party was recognized ; but the money had not been paid over to the owner of the equity of redemption, but had been paid into court on application of the mortgagee. It was held that the latter was entitled to deal with the condemnation proceedings as a conversion of so much of the mortgaged premises as was taken, and that under the circumstances equity required him to do so, and that he was under no necessity of having recourse to the mortgaged premises. Here the mortgagees have had recourse to the mortgaged premises, and have sold them for the payment of their mortgage claims. The receiver is not before me, asking for relief. He is proceeding to obtain a valuation, according to law, by condemning the land as the property of the bank, thus recognizing the bank's legal title to it. Were the affairs of the company in its own hands, I would, for the reasons above given, dismiss the petition, but they are not. They are in the hands of this court for administration, and I am not satisfied that the course which the receiver proposes to pursue, in this matter, is for the interest of the company. That subject was not discussed on the hearing of this matter, and I require further information on the subject. The receiver will therefore report to me his reasons for proceeding to a new condemnation, and the final decision of this application will be reserved until after his report shall have come in.

SARAH C. WILLIAMS

v.

WILLIAM E. WILLIAMS.

The parties to this suit were married in November, 1875. In March, 1876, the husband, being angry with his wife, who upbraided him for being intoxicated when he came home, moved all of his furniture out of the house where they were then living together, and left her there alone. She then went to

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her father's house, and has ever since been supported by her parents, or by her own labor. Her husband contributed nothing towards her maintenance, or that of her infant, during its lifetime, and had no communication whatever with her, although they both continued to live in the same town after March, 1876.—*Held*, that the wife was entitled to a divorce for desertion.

Petition for divorce *a vinculo*. On final hearing on pleadings and proofs.

Mr. E. L. Price, for petitioner.

Messrs. Vail & Ward, for defendant.

THE CHANCELLOR.

The desertion charged is stated to have taken place on the 27th of March, 1876. The parties were married at Rahway, in November, 1875. The petition was filed March 28th, 1880, about four years after the alleged desertion. The proof shows clearly that, at or about the first-mentioned date, the defendant, being angry with the petitioner (she says it was because she upbraided him for being intoxicated when he came home), moved all his furniture out of the house in which they were then living together, in Rahway, and left her there alone. She then went to her father's house, and has ever since been supported by her parents, or by her own labor, he contributing nothing to her support. Although, in November, 1876, she was delivered of a child, he paid her no attention whatever. The child lived for about ten months, and died in July, 1877, at her father's house in Rahway. Although the defendant lived in Rahway, he never went to see the child, either before or after its death, and did not attend its funeral or pay anything for its support or the expenses of its sickness and burial. He has lived in Rahway, and his wife has lived in that place, or Newark, ever since the desertion, yet, according to his own testimony, he had not communicated with her in any way for the period of more than three years when this suit was begun. Her testimony on the

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subject of the desertion is corroborated, while his is not. He left her in 1876, and has ever since lived wholly apart from her, and has not in any way discharged his duty towards her. There will be a decree of divorce.

THE CAIRO AND FULTON RAILROAD COMPANY

v.

BENJAMIN W. TITUS et al.

Where a judgment has been recovered at law, and the party who recovered it has been enjoined in chancery from proceeding thereon, and a new trial has been ordered, such new trial may, in a proper case, be had in chancery, or, in the discretion of the chancellor, may be had at law, either by an issue out of this court or in the suit at law, and where a new trial in the suit at law is ordered, unless the party who recovered the judgment will consent to such new trial, he will be perpetually enjoined from enforcing his judgment.

Bill for relief. Motion for direction as to the proper procedure in the cause.

Mr. T. N. McCarter, for complainant.

Mr. C. Parker, for defendants.

THE CHANCELLOR.

The question is raised as to the proper practice in respect to the forum of the trial in such a case as this—whether it should be this court or a court of law. The suit is brought for relief against a judgment recovered by the defendants against the complainant, in the supreme court of this state, and an injunction has been granted and a new trial ordered, pursuant to the prayer thereof. *Cairo and Fulton R. R. Co. v. Titus*, 5 Stew. Eq. 397. This court does not, in such cases, act upon the case, but

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upon the parties. It cannot set aside the judgment, but it can relieve against it. Where a judgment has been secured by artifice or concealment on the part of the plaintiff, and the court where the fraud has been perpetrated is not able to afford adequate relief there, this court will take hold of the party who has committed the fraud, and will prevent him from using the judgment to the injury of his adversary, or, if he has enforced his judgment, will hold him as a trustee and compel him to account for the fruits of his iniquity. *Tomkins v. Tomkins*, 3 Stock. 512. In such cases, there may be a new trial in the court of law. Originally, chancery compelled new trials at law by perpetually enjoining the plaintiff in the judgment from enforcing it unless he would consent to a new trial, the injunction being the means by which the plaintiff was constrained to do justice. And the practice of thus compelling new trials at law still exists. 3 Gra. & Wat. on New Trials 1482, and cases there cited. In *Carrington v. Holabird*, 19 Conn. 84, there was a decree for a new trial at law. In *Yancey v. Downer*, 5 Litt. 8, the court of appeals of Kentucky, reversing a decision of the chancellor, ordering a new trial at law, *in totidem verbis*, said that the chancellor ought to decree that, unless the defendant in chancery consents, in the common law court, to a new trial, in a reasonable time, his hands shall be tied and he be perpetually restrained from executing his judgment. See, also, *Bush v. Craig*, 4 Bibb 168, and *Floyd v. Jayne*, 6 Johns. Ch. 479. But this court may itself adjudicate upon the matter, without the aid of a jury, and there are many cases where there obviously would be no propriety in referring or permitting the case to go again to law, as, for example, where the newly-discovered defence is a release of or receipt for the debt for which the judgment was

NOTE.—An issue at law is discretionary with the chancellor, where a defendant in a court of law applies for an injunction against a judgment, upon facts in relation to which the proof is contradictory, *Key v. Knott*, 9 Gill & Johns. 342. See *Foote v. Silsby*, 1 Blatch. 545. So, upon a bill of review. *Elliott v. Balcom*, 11 Gray 286. See, further, *Proffatt on Jury Trials*, §§ 89-94; *Sinclair v. Price*, 1 Hill Ch. 431; *Fernie v. Young*, L. R. (1 H. of L.) 63.—
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recovered. In *Crawford v. Crawford*, 4 *Desauss.* 176, the judgment had been obtained on a bill of sale, which either was fraudulent, or, if genuine and properly obtained, was put to a fraudulent use. The court so decided on the testimony, and thereupon enjoined the defendant perpetually from enforcing the judgment. In *Hunter v. Boykin*, 1 *Desauss.* 108, equity enjoined the plaintiff in a judgment recovered for the nominal amount of depreciated currency, from enforcing it, except for the amount of the true value, which it itself determined by reference to a master. This court can, in any given case, itself give effect to the testimony with respect to which a new trial may be ordered, and determine what difference it ought to have made in the result of the trial at law, if it had been introduced there. In such case, there will, in effect, be a new trial in this court, instead of the court of law. It is quite within the power of this court, too, to order an issue if it see fit to do so. In *Winthrop v. Lane*, 3 *Desauss.* 310, the court would have done so had the parties consented, and only in view of their refusal and the length of time the cause had been in court, refrained from doing so, and decided the matter itself. In the case in hand, under the circumstances, there should be a new trial at law, and unless the defendants will consent to such new trial in a reasonable time, they will be perpetually restrained from enforcing their judgment.

THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD
COMPANY

v.

WALTER E. LAWTON.

On demurrer to a bill for the specific performance of a contract, whereby defendant, among other things, agreed to convey to a railroad company (whose legitimate successor is the complainant) the right of way for its railroad, one

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hundred feet in width, over and across his lands, situate &c., and the company, for itself and its successors, covenanted that its railroad should be located and built on the line then already agreed upon by him and the engineer of the company, and designated in the agreement by a reference to a map,—*Held*, that an averment, on “information and belief,” that the railroad had been constructed on the line mentioned in the agreement, but whether so or not that it was constructed on a line agreed upon by the defendant as satisfactory, and had been operated ever since on said line, without objection or complaint by defendant, “so far as complainant knows, and as it believes,” lacks certainty and explicitness as to the location of the line of the railroad, and as to the description of the premises claimed to be included in the contract.

Bill for specific performance. On demurrer.

Mr. T. N. McCarter, for demurrant.

Mr. J. W. Taylor, for complainant.

THE CHANCELLOR.

This is a suit for specific performance of a contract in writing, made by the defendants with the New Jersey Midland Railway Company, by which he agreed to subscribe and pay for one hundred shares of the capital stock of that company; and that, on the location of the line of its railroad as provided in the agreement, and without further consideration than that which was expressed in the agreement, he would grant and convey to the company the right of way for its railroad, one hundred feet in width, over and across his lands and premises, situate on the island known as “The Little Ferry Farm,” near Ridgefield, in Bergen county, and such ground in addition thereto, not exceeding an acre, as might be necessary for depot purposes upon that farm for his accommodation; and the company, for itself and its successors, thereby covenanted and agreed that its railroad should be located and built over and across those premises of the defendant, on the line then already agreed upon by him and the engineer of the company, and designated in the agreement by a reference to a map. And the company also agreed, for itself and its successors, that whenever it should be thereunto requested

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by the defendant, it would keep up and maintain a station, and stop certain passenger trains on the premises &c. The bill states that, as the complainant is informed and believes, the railroad was afterwards located and built over and across the defendant's premises mentioned in the agreement, on the line mentioned in the agreement, but that whether the said railroad was located and built upon the line so agreed upon or not, it was located and built upon a line agreed upon and approved by the said Lawton, and with respect to which he expressed himself as entirely satisfied, and has ever since been operated upon said line without objection or complaint from the said Lawton, so far as the complainant knows, and as it believes.

The bill also states that, subsequently to the making of the agreement, the Midland company gave a first mortgage on its railroad and franchises and property of every kind, then acquired or thereafter to be acquired in respect to the railroad, including its rights under those articles of agreement, to George S. Coe and others, trustees, to secure the payment of bonds issued by it to the amount of \$3,000,000, or thereabouts; and that the company having failed to pay the interest, the trustees filed their bill in this court for foreclosure of the mortgage, or sale of the mortgaged premises for the satisfaction of the money due on the bonds; and that such proceedings were thereupon had in this court, that afterwards it was decreed that the mortgaged premises, including the rights of the company under the agreement, in respect to the lands therein mentioned, should be sold at public auction for the satisfaction of the money due on the mortgage and other liens referred to in the decree, and that thereupon a writ of *fiери facias* was issued out of this court, under which the mortgaged premises were sold for \$2,500,000 to Charles Parsons, who purchased on behalf of himself and his associate holders of the bonds; and that a deed of conveyance was given according to law to him therefor by the master by whom the property was so sold.

The bill further states that Parsons and others, on whose behalf the purchase was made, and who, under the act "concerning the sale of railroads, canals, turnpikes, bridges and plank

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roads," and the supplements thereto and amendatory thereof; were constituted a body politic and corporate, and became vested with all the rights, title, interest, property, possession, claim and demand, in law and equity, of, in and to the railroad, with its appurtenances, and all the rights, powers, immunities, privileges and franchises of the Midland company, and afterwards and within the time fixed by the statute, pursuant to the act and its supplements, met and organized the new corporation, by electing a president and board of directors thereof, and adopting as the corporate name "The Midland Railroad Company of New Jersey," and by performing the other things required by the act, and filed a certificate of the organization, under the seal of the new corporation, as required by the act.

It further alleges that afterwards, by virtue of the statute in such case made and provided, the Midland Railroad Company of New Jersey became consolidated with other corporations, thereby forming a new company, under the name of the New York, Susquehanna and Western Railroad Company (the complainant), whereby the complainant has succeeded to all the franchises, property and rights, including all the rights under the articles of agreement of the New Jersey Midland Railway Company and its immediate successor, the Midland Railroad Company of New Jersey.

It further states that there has been no request to keep up a station on the premises of the defendant, or to stop trains there, and that the defendant has not chosen or designated a location for a depot on the premises.

The demurrant insists that the complainant does not sufficiently show its title to claim the relief which it seeks; that it should set out in the bill the mortgage and proceedings in foreclosure and sale, and the conveyance; that it does not allege, in particular, the performance of the requisites to re-organization and consolidation; that the New Jersey Midland Railway Company and the Midland Railroad Company of New Jersey should be parties to the suit, and that the statements of the bill otherwise would not be sufficient if the suit were between the original parties to the agreement, there being no proper allegation that the road

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was constructed as provided in the agreement, and no statement of the particular land claimed, and no allegation that the contract was executed by the railroad company.

The bill sets forth the complainant's title to the rights of the New Jersey Midland Railway Company with all necessary averments. It states that the defendant entered into the agreement with that company; that the agreement was in writing, and that he thereby covenanted and agreed with that company that, for the consideration expressed in the agreement, he would, on the location of the line of its railroad as thereafter provided, and on its request, convey to it the right of way, one hundred feet wide, across his land. It sets out the agreement *verbatim*, and the agreement purports to be signed by the company, by its president, and sealed with its seal. It states (and with commendable brevity) that the company mortgaged its property, including its rights under the agreement, the foreclosure proceedings and sale and purchase, and the re-organization and consolidation, with all necessary averments. In deducing its title under the foreclosure, it was necessary to set out the agreement, the mortgage (the latter to such an extent as to show that the rights of the New Jersey Midland Railway Company under the agreement were mortgaged thereby) and the fact of the foreclosure and sale and conveyance. It has done all this so far as was necessary. The statements of the bill show that the rights of the New Jersey Midland Railway Company under the agreement passed away from it by the foreclosure and sale, and that it was wholly divested thereof, and that they were transferred to the purchaser, the new organization. As to the new organization and consolidation, the averments are sufficient. If the defendant desires to contest the complainant's claim thereunder, he will be put to his plea. Neither the New Jersey Midland Railway Company nor the Midland Railroad Company of New Jersey is a proper party to the bill.

By the agreement, the defendant agrees to convey land for the right of way, and for the depot. The bill alleges performance on the part of the complainant and its predecessors, and prays for a specific performance of the agreement on the part of the

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defendant, and the complainant tenders itself ready to perform the agreement on its own part. It does not ask for a conveyance of the land for a depot, and it is urged, on behalf of the defendant, that the agreement is entire to convey the land for the right of way and for the depot, and that performance of part only—the conveyance of the land for the right of way alone—cannot equitably be asked. But the bill alleges that the railroad company has never been requested to establish the depot, and it surely would not be equitable to require the defendant to convey the land for a depot until such time as he shall require the establishment of the depot. The bill, however, is defective in the statement as to the location and building of the railroad over the defendant's land. It does not allege positively, but only on information and belief, that the road was located and built on his land at all. It avers, on information and belief, that it was built on his land on the line mentioned in the agreement, and adds that, if it was not built on that line, it was located and built on a line which was agreed upon and approved by and satisfactory to the defendant, and has ever since been operated upon such line without objection or complaint from him, so far as the complainant knows, and as it believes. The bill lacks certainty in the statement of this important matter. It should show, by specific and positive averment, that the road was located as provided for in the agreement, or, if any other location was substituted therefor, it should be so alleged, positively and explicitly. And the bill should state, by such description as to identify it, the land over which it claims the right of way. When the line is described, the claim of fifty feet on each side of it will be definite enough without further description.

The demurrer will be allowed, with costs, but the complainant will have leave to amend.

Lanning v. Sisters of St. Francis.

WILLIAM M. LANNING, administrator &c.,

v.

THE SISTERS OF ST. FRANCIS OF TRENTON, NEW JERSEY,
et al.

1. A charitable gift to a hospital will be sustained notwithstanding a misnomer of the corporation, and it will hold the gift on the conditions and trusts named by the donor.

2. A trust to pay over the interest of a fund to certain persons during their lives, and to divide the principal thereafter, does not devolve upon an administrator *cum test. an.*; nor can such administrator sell lands of the decedent and divide the proceeds as directed in the will, if a personal trust in that respect was confided in the executor.

NOTE.—Under a gift to a legatee by an erroneous name without any descriptive words, parol evidence has been held admissible to prove who the testator intended should take, *Beaumont v. Fell*, 2 P. Wms. 141; [see *Bigelow's Overruled Cases*; *Barnes v. Simms*, 5 Ired. Eq. 396]; *Masters v. Masters*, 1 P. Wms. 425; *Thomas v. Stevens*, 4 Johns. Ch. 607; *Hart v. Marks*, 4 Bradf. 161; *Wood v. White*, 32 Me. 340; *Meadows v. Barry*, 2 Ga. Dec. 80. See *Knight v. Bunn*, 7 Ired. Eq. 77.

The name may control an erroneous description of the legatee, *Neathway v. Ham*, Tamlyn 316; *Garner v. Garner*, 29 Beav. 114; *Fellham's Will*, 1 K. & J. 528; *Standen v. Standen*, 2 Ves. 589; *Re Blackman*, 16 Beav. 377; *Giles v. Giles*, 1 Keen 685; *Gains v. Rouse*, 5 C. B. 422; *Holmes v. Cunstance*, 12 Ves. 279; *Stringer v. Gardiner*, 27 Beav. 35, 4 De G. & J. 468; *Plunkett's Estate*, 11 Irish Ch. 361; *Newbolt v. Price*, 14 Sim. 354; *Gillett v. Gane*, L. R. (10 Eq.) 29; *Garland v. Beverly*, L. R. (9 Ch. Div.) 213; *In re Ingle's Trusts*, L. R. (11 Eq.) 578; *Dane v. Walker*, 109 Mass. 179; *Gardner v. Heyer*, 2 Paige 11; *Smith v. Smith*, 1 Edw. Ch. 189, 4 Paige 271; *Connolly v. Pardon*, 1 Paige 291; *Vernor v. Henry*, 3 Watts 285; *Joiner v. Joiner*, 2 Jones Eq. 68; *Gallup v. Wright*, 61 How. Pr. 286; *Bullock v. Zilley*, Sax. 489.

The description of the legatee may control an error in his name, *Smith v. Coney*, 6 Ves. 42; *Blundell v. Gladstone*, 11 Sim. 467, 1 Phil. 279, 1 H. L. Cas. 778; *Thomas v. Thomas*, 6 T. R. 671; *Trimmer v. Bayne*, 7 Ves. 508; *Bradshaw v. Bradshaw*, 2 Y. & C. 72; *Gregory's Settlement*, 11 Jur. (N. S.) 634; *Hodgson v. Clarke*, 1 De G. F. & J. 394; *Lee v. Pain*, 4 Hare 253; *Bradwin v. Harpur*, Amb. 374; *Noble's Trusts*, L. R. (5 Irish Eq.) 140; *Pitcairne v. Brase*, Finch 403; *Stockdale v. Bushby*, 19 Ves. 331; *Cook v. Danvers*, 7 East 299; *Dent v. Pepys*, 6 Madd. 350; *Bernansconi v. Atkinson*, 10 Hare 345;

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3. A devise of "my house, * * * No. 160 Rose street," * * * to M. and A. for life, and after both shall have died the house or property shall be sold" &c., passes not only the house but all of the lands surrounding it which had been used therewith by testatrix's grantor, the whole property having been conveyed to the testatrix by one deed, and subsequently used and enjoyed by her in the same way.

4. A gift was to "Joseph C. Link's children, Mary and Sethe Link." Joseph C. Link had only two children, Mary and Sarah, who was called in the family Sadie. The will was drawn by a German.—*Held*, that Sarah was intended by the name "Sethe."

Bill for construction of will. On final hearing on pleadings and proofs.

Mr. W. M. Lanning, in pro. pers.

Mr. J. S. Aitkin, for Sisters of St. Francis and Baldauf's children.

Adams v. Jones, 9 Hare 485; Farrar v. St. Catharine's College, L. R. (16 Eq.) 19; Nunn's Trusts, L. R. (19 Eq.) 331; Wolverton's Estates, L. R. (7 Ch. Div.) 197; Carpenter v. Bott, 15 Sim. 606; Stokeley v. Gordon, 8 Md. 496; Hall v. Leonard, 1 Pick. 30; Thayer v. Boston, 15 Gray 347; Evans v. Hooper, 2 Gr. Ch. 204; Ex parte Hornby, 2 Bradf. 420; Wagner's Appeal, 43 Pa. St. 102; Powell v. Biddle, 2 Dull. 70. See, also, Buchanan v. Roy, 2 Ohio St. 251; Russell v. Marks, 3 Metc. (Ky.) 40; Walker v. Wells, 25 Ga. 141; Tuggle v. McMath, 38 Ga. 648; Morse v. Stearns, 131 Mass. 389.

"To John and Benedict," sons of John Sweet, a son named James, there being no John, and only two sons, was held to be entitled, *Dowset v. Sweet, Amb. 175.*

"Unto Sophia Still, the daughter of Peter Still," who had but two daughters, Selina and Mary Ann, Selina took, *Still v. Hoste, 6 Madd. 192.*

"To my son W. two hundred acres of land; also a negro girl named Nice * * to his wife Cinthia, during his natural life, and at his death to go to his oldest daughter." William was married in 1802 to S. L., and had by her one child, Mary, but he had separated from S. L. when Mary was an infant and married Cynthia, who was delivered of a daughter a few weeks before the will was made, and who is still living.—*Held*, that Mary took Nice. *Ward v. Eepy, 6 Humph. 447.*

In letters of guardianship, two minors were called "Phebe Vose Sowle and Mary Jeffers Sowle, children of N. S.," and in the guardian's deed of their lands, they were called Phebe Sowle and Polly Sowle, daughters of N. S. and granddaughters of N. S.—*Held*, good, *Sowle v. Sowle, 10 Pick. 376.*

"To Mr. James Massie and W. G., * * * and to Mrs. G." Inquiry was ordered as to Mrs. G., *Abbott v. Massie, 3 Ves. 148.*

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Mr. W. D. Holt, for Mary and Sarah Link.

THE CHANCELLOR.

This is a suit for the construction of the will of Mrs. Margaretta Mayer, deceased, late of the city of Trenton. The will was made April 28th, 1880. By the first clause the testatrix directs payment of her debts and funeral expenses. By the second and third she gives directions for her funeral and for masses. By the fourth she gives a small legacy for books for certain poor children. The fifth is as follows :

"I will \$500 to the St. Francis Hospital, in Chambersburgh, Mercer county, state of New Jersey. The \$500 shall remain as a fund as long as the hospital lasts. I will [that] the interest only shall be divided among the sick every year; and furthermore, I direct that every year, [on] the day of my death, [there] shall be one high mass prayed in the church or chapel of St. Francis Hospital for me and [my] family."

"To my niece, the daughter of my late sister Sarah." Testator had had one sister only, named Sarah Ann, who had died fifteen years previously, and had never had a daughter, and but one child, a son, who took, *Ricketts's Trust*, 21 Eng. L. & Eq. 66, 17 Jur. 664.

"To my said son Thomas and my daughter Patsy, who was also born before I married her mother, and is now the wife of C. B." Patsy's heirs may show that she was legitimate, *Eringhaus v. Cartwright*, 8 Ired. 39.

"To Elizabeth Abbott (a natural daughter of Elizabeth Abbott, of G., a single woman who formerly lived in my service) for life, with remainder to her children." Elizabeth Abbott, of G., had a natural son, John, and afterwards married and had a legitimate daughter, Margaret, who was living. John was dead. His children took, *Ryall v. Hannam*, 10 Beav. 536.

"To Stokeham Huthwaite, second son of John H., and in default of issue, to John Huthwaite, third son of John H." Stokeham was, in fact, the third son, and John the second, and which one was intended was left to the jury, *Le Chevalier v. Huthwaite*, 3 B. & Ald. 632.

"Unto William Marshall, my second cousin." Testator had no second cousin of that name, but two first cousins once removed, one named William Marshall, and the other William John Robert Blandford Marshall, who, under the parol evidence, took, *Bennett v. Marshall*, 2 K. & J. 740.

In other cases, evidence to rectify an erroneous description has been held inadmissible.

"To my nephew B." Testator had two brothers, and one had a legitimate son B., and the other an illegitimate son B.—*Held*, that the legitimate son B. took, and that parol evidence to show that testator intended the illegitimate son B. to take, was inadmissible, *Appel v. Byers* (Pa.), 13 Rep. 60.

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By the sixth, she gives \$500 to Augusta Mayer, directing that she have the use of the interest thereof only for life, and that after her death the fund be divided among certain persons named in that connection. By the seventh, a gift of a like sum is made to Elizabeth Schmitt, she to have the interest only of it for life, and at her death the principal to go to her two sons. The eighth is as follows :

"I will my house to Mary Baldauf and Anthony Baldauf, No. 160 Rose street, Trenton, New Jersey ; and the plate on the front door, M. Mayer, shall remain forever. Both Mary and Anthony Baldauf [shall] have the use as long as they live, and after both [shall have] died the house or property shall be sold and the money shall be divided to (among) Anthonv's first wife's children, three boys and one girl."

By the ninth she disposes specifically of certain articles of personal use. The tenth is as follows :

"To the children of my sisters Estrella and Reyna." Estrella had children and Reyna none, and had changed her name and was a nun professed when the will was drawn, but the testator had a third sister, Rebecca, who had children.—*Held*, they could not take, *Del Mare v. Rebello*, 1 Ves. 412, 3 Bro. C. C. 446.

"To James son of Thomas," Thomas son of James cannot take, *Andrews v. Dobson*, 1 Cox 425.

"To testator's son John H. for life, then to testator's grandson John H., eldest son of the said John H." The testator's son John H. had been twice married ; by his first wife he had a son Simon, by his second an eldest son John and also younger children. Evidence of testator's declarations and instructions as to which grandchild he intended, was held inadmissible, *Hiscocks v. Hiscocks*, 5 M. & W. 363.

"To my nephew John Henry M., of H., but late of Calcott Hall, and should he not marry, to be divided equally between Samuel M., John M. and Mary D., all of them late of Calcott Hall." There was a son Thomas, born between Samuel and Mary, but no son John. Thomas was excluded, *Mostyn v. Mostyn*, 17 Beav. 323, 3 De G. M. & G. 140, 5 H. of L. Cas. 155.

"To my sister M. F. T. D. * * and a portion of the residue to my niece M. F. T. D." He had a sister-in-law, M. F. T. D., but no niece, although he had nieces bearing some of the names. The gift of the residue was held void, *Drake v. Drake*, 25 Beav. 642, 8 H. of L. Cas. 172.

"To Francis Courtenay Thorpe, of Hampton, gentleman, my executor." There was living a youth of twelve years, to whom the name and description applied. Evidence to show that testator meant the youth's father, whose

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"I will and appoint John Reiser, in the city of Trenton, Mercer county, state of New Jersey, in fee simple, to have power over all my real estate and personal property after I am deceased, to sell and divide all the money to Joseph C. Link's children, Mary and Sethe Link, to have the interest every year for their use only; after they become of age each one shall have [an] equal share for (of) what I will to them. The 9th part shall have their share before the 10th part; and [as to] what is left, Joseph C. Link's children shall have the half part of my real estate after all [shall have] got their share (shares) what (whom) I have named before."

By the eleventh she gives to the two sons of her brother, Casper Link, deceased, the half of her real estate and personal property after her death. The twelfth is as follows:

"I give, devise and bequeath unto my administrator and executor, John Reiser, Trenton, Mercer county, state of New Jersey, all my estate, both real and personal and mixed, wheresoever the same is situate and of whatsoever

name was Francis Corbet Thorpe, was refused. *Peel's Case*, L. R. (2 P. & D.) 46.

"To my son, Forster Charter," who was also made executor. Testator's eldest son was William Forster Charter, but he had not lived in the vicinity for a long time, and had always been called William or Willie. The younger surviving son was Charles Charter. Evidence of testator's declarations against the claim of W. F. C. was held inadmissible, *Charter v. Charter*, L. R. (7 H. L. Cas.) 364.

To testator's grandchildren, Margaret Diggs and Lucy Diggs, children of his daughter Catharine, and to his granddaughter, Margaret Diggs, and to his grandchildren, Celia Diggs and Dudley Diggs. Testator had a daughter Catharine, who had married John Diggs, and they were both dead when the will was made, leaving four children, Margaret, Sarah, Lucy and Dudley, and they never had any child named Celia.—*Held*, that Lucy could not take as Celia, *Yates v. Cole*, 1 Jones Eq. 110.

A gift may be made to a legatee by a nickname. *Baylis v. Atty.-Gen.*, 2 Atk. 239; *Andrew v. Dobson*, 1 Cox 425; *Commercial Bank v. Clapier*, 3 Rowl. 339. Thus, a legacy to testator's brother Edward, he having only one brother, named Samuel, whom he called Edward and Ned, is good. *Parsons v. Parsons*, 1 Ves. 266.

Sally, in a pauper notice to one named Sarah, was held good. *Shelburne v. Rochester*, 1 Pick. 470; and in an indictment, *Bell v. State*, 25 Tex. 574.

The following nicknames and abbreviations have been held to be equivalent to the Christian names: Andy and Andrew, *Talkington v. Turner*, 71 Ill. 236; Anny and Anne, *State v. Upton*, 1 Dev. 513; Aug. and Augustus, *Morgan v. State*, 45 Ala. 64; Barney and Barnabas, *McGregor v. Balch*, 17 Vt. 567; Ben. and

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the same may consist, to the use of my administrator and executor, John Reiser, city of Trenton, Mercer county, state of New Jersey, in fee simple."

By the thirteenth she appoints Reiser executor.

The will was duly admitted to probate and letters testamentary thereon issued to Reiser by the surrogate of Mercer county, September 28th, 1880. Reiser died in May, 1881, and letters of administration *cum testamento annexo de bonis non*, were issued to the complainant. The questions submitted are whether the \$500 mentioned in the fifth section shall be paid over to "The Sisters of St. Francis of Trenton, New Jersey," the corporation owning, controlling and managing the hospital mentioned in that section, and, if not, what disposition shall be made of the fund; whether the complainant, as administrator *cum testamento annexo de bonis non*, has power to execute the trusts created by the sixth, seventh and tenth sections; whether he has

Benjamin, *Ibid.*; *Burton v. State*, 75 Ind. 477; *State v. Taggart*, 38 Me. 299; Betsy and Elizabeth, *State v. Godet*, 7 Ired. 210; Bill and William, *McBeth v. State*, 50 Miss. 82; Burt. and Burton, *State v. Angel*, 7 Ired. 27; Christ. and Christopher, *Wood v. Bulkley*, 13 Johns. 486; Cuff. and Cuffy, *State v. Ferr*, 12 Rich. 24; Curt. and Curtis, *Lytle v. State*, 31 Ohio St. 196; Dan'l and Daniel, *Com. v. Webster*, 38 Me. 300; Francis and Franciscus, *Griffith v. Middleton*, Cro. Jac. 425; Harry and Henry, *Wray v. Thorne*, Willes 488; *Rex v. Roberts*, 2 Stra. 1214; *Gordon v. Holliday*, 1 Wash. C. C. 285; but see *Garrison v. People*, 21 Ill. 535; Jas. and James, *Stephen v. State*, 11 Ga. 240; Jno. and John, *State Bank v. Peel*, 11 Ark. 750; Jo. and Joseph, *Com. v. O'Baldwin*, 103 Mass. 210; *Bolling v. Anderson*, 1 Tenn. Ch. 135; *Talkington v. Turner*, 71 Ill. 236; but see *United States v. Keen*, 1 McLeun 429; *Crawford v. Slye*, 4 Cranch C. C. 457; Joan and Jane, *Griffith v. Middleton*, Oro. Jac. 425; Joan and Jonathan, *Scott v. Soans*, 3 East 111; Julee and Juli, *Point v. State*, 37 Ala. 148; Jules and Juli, *Point v. State*, 1 Ala. 54; Liew and Louisa, *Hays v. State*, 40 Md. 633; Lou and Louisa, *State v. Vestal*, 82 N. C. 563; Margery and Margaret, *Gynes v. Kemsley*, Freem. 293; Mary Etta and Marietta, *Goode v. State*, 2 Tex. App. 520; Nathan and Nathaniel, *Utsler v. Utsler*, Wright 627; Phi. and Philander, *Com. v. Hughes*, 10 B. Mon. 160; Phillis and Philip, *Tudor v. Terrell*, 2 Dana 47; Polly and Mary, *Soule v. Soule*, 10 Pick. 376; Rich'd and Richard, *Poindexter v. Com.*, 6 Rand. 667; Sander and Alexander, *Griffith v. Middleton*, Cro. Jac. 425; Susan and Susannah, *Trimble v. State*, 4 Blackf. 435; *State v. Johnson*, 67 N. C. 55; Th. and Thomas, *Ogden v. Gibbons*, 2 South. 531; Thos. and Thomas, *Studstill v. State*, 7 Ga. 2; Tom and Thomas, *Wolverton's Estate*, L. R. (7 Ch. Div.) 197; Wm. and William, *Reg. v. Bradley*, 3 El. & El. 634; Linn v. Buckingham, 1 Scam. 451; Cha-

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power to sell the real estate ; whether the devise in the eighth section is of all the property on Rose street on which the testatrix lived (the house thereon was numbered 160), or only that part of it on which the house and other buildings stand ; whether Joseph Link's daughter Sarah is the person referred to by the name of "Sethe" in the tenth section, and to whom and in what proportions the residue of the estate goes.

The gift of the \$500 to the hospital is a valid charity. *Perry on Trusts* § 699 ; *Atty.-Gen. v. Moore's Exrs.*, 4 C. E. Gr. 503. The gift is, in effect, to the corporation of the hospital. The misnomer will not defeat the gift *Boyle on Char.* 130 ; *McBride v. Elmer's Exrs.*, 2 Hal. Ch. 107 ; *De Camp v. Dobbins*, 2 Stew. Eq. 36 ; *Goodell v. Union Association*, Id. 32. And it is an

masero v. Gilbert, 26 Ill. 39 ; *Boyd v. State*, 7 Coldw. 69 ; but see *Opinions of Justices*, 64 Me. 596 ; *Ware v. McQuillan*, 54 Miss. 704.

But not in the following cases : *Bart. and Bartholomew, Rives v. Marra*, 25 Ill. 316 ; *Curtis v. Marra*, 29 Ill. 508 ; *Bute and Alfred, Robinson v. State*, 30 Tex. 437 ; *Dug. and Douglas, Jones v. State*, 63 Ala. 27 ; *Geo. and George, Wilson v. Shannon*, 6 Ark. 196 ; see *Patterson v. People*, 12 Hun 137 ; *May and Mary, Kennedy v. Merriam*, 70 Ill. 228 ; but see *State v. Eneigh*, 18 Iowa 122.

The rule of *idem sonans* was applied in the following instances : *Abbotsan and Abbasan, Cotton's Case, Cro. Eliz.* 258 ; *Adanson and Adamson, James v. State*, 7 Blackf. 325 ; *Adderson and Anderson, Van Pelt v. Pugh*, 1 Dev. & Bat. 210 ; *Anthron and Antrim, State v. Scurry*, 3 Rich. 68 ; *Ambrose and Ambrosis, State v. Bayonne*, 23 La. Ann. 78 ; *Augustine and Augustina, Com. v. Desmarteau*, 16 Gray 15 ; *Aramanti and Amaranti, Musquez v. State*, 41 Tex. 226 ; *Bagswell and Bagwell, Case v. Bartholow*, 21 Kan. 300 ; *Baswell and Basil, Hyde v. Watson*, 1 Denio 670 ; *Beckwith and Beckworth, Stewart v. State*, 4 Blackf. 171 ; *Benedetto and Beniditto, Akitbol v. Beniditto*, 2 Trunt. 401 ; *Bennaux and Beneux, Beneux v. State*, 20 Ark. 97 ; *Berry and Barry, Ratteree v. State*, 53 Ga. 570 ; *Berry v. Mitchell*, 2 Allen (N. B.) 380 ; *State v. McNamara*, 3 Nev. 70 ; *Beton and Belton, Belton v. Fisher*, 44 Ill. 32 ; *Bice and Boyce, Boyce v. Danz*, 29 Mich. 146 ; *Biddulph and Puthuff, Pillsbury v. Dugan*, 9 Ohio 120 ; *Bikerstaffe and Bickerstaffe, Heskett v. Lea*, 1 Vent. 73 ; *Blackenship and Blankenship, State v. Blunkenship*, 21 Mo. 504 ; *Blackman and Blackburn, Miller v. State*, 53 Miss. 403 ; *Blenkhome and Blenkin, Stockdale v. Blenkin*, 1 Price 277 ; *Boge and Bogue, Bogue v. Bigelow*, 29 Vt. 179 ; *Boswell and Roswell, Brooking v. Dearmond*, 27 Ga. 58 ; *Boson and Bozon, Bulst.* 8 ; *Boudet and Burdet, Aaron v. State*, 1 Ala. 12 ; *Braddy and Brady, Dickerson v. Brady*, 23 Ga. 161 ; *Bryon and Bryan, Tyser v. Bryan*, 2 Dowl. 640 ; *Bubb and Bobb, Myer v. Fegaly*, 39 Pa. St. 439 ; *Burdet and Boredet*,

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absolute gift by its terms. By the charter of the hospital (*P. L. of 1873 p. 928*) it is declared that the essential object of the corporation shall be the erection and maintenance of a hospital for the care of the sick, and the right of perpetual succession is granted. The corporation will take the fund and hold it on the trust declared in the will, that is, in trust to invest it and devote the interest to the purpose specified in the will—the benefit of the sick in the hospital.

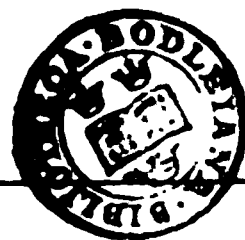
The trusts created by the sixth and seventh sections of the will—to invest, pay over interest for life, and at the death of the life-tenant, divide the principal—do not devolve on the administrator. Nor does that created by the tenth section, for the benefit of the children of Joseph C. Link.

Aaron v. State, 37 Ala. 106; *Buter and Butler, Reeves v. State*, 20 Ala. 33; *Byles and Bayles, Hoagland v. Culvert, Spenc.* 388; *Byrne and Burns, State v. Burns*, 8 Nev. 251; *Cahew and Cahill, State v. Thompson*, 20 N. H. 250; *Charleston and Charlestown, Alvord v. Moffatt*, 10 Ind. 366; *Chamble and Chambless, Ward v. State*, 28 Ala. 53; *Chatam and Chatham, Roth v. State*, 10 Tex. App. 27; *Chin Chan and Chin Chang, Wells v. State*, 4 Tex. App. 20; *Coburn and Colburn, Colburn v. Bancroft*, 23 Pick. 57; *Conly and Connolly, Fletcher v. Conly*, 2 Greene 88; *Conn and Corn, Moore v. Anderson*, 8 Ind. 19; *Corrigan and Corgan, Prince v. McLean*, 17 U. C. Q. B. 463; *Coonrod and Conrad, Carpenter v. State*, 8 Mo. 291; *Conway and Conaway, Conaway v. Hays*, 7 Blackf. 159; *Cuffy and Cuff, State v. Farr*, 12 Rich. 24; *Currier and Kiah, Tibbets v. Kiah*, 2 N. H. 557; *Daniel and David, Jackson v. Stanley*, 10 Johns. 133; *Haul v. Lasher*, 24 U. C. Q. B. 357; *Danner and Dannaher, Gahan v. People*, 58 Ill. 160; *David and Daniel, Com. v. Riggs*, 14 Gray 376; *Davies v. Pratt*, 16 C. B. 586; see *Sweazy v. Nettles*, 2 Mo. 6; *Davis and Davids, Taylor v. Com.*, 20 Gratt. 825; *Deadema and Diadema, State v. Patterson*, 2 Ired. 346; *Danden and Darden, State v. Turner*, 25 La. Ann. 573; *De Hust and De Hurst, Mortimer v. Oger, Cro. Eliz.* 258; *Doerges and Dierkes, Gorman v. Dierkes*, 37 Mo. 576; *Domick and Domeck, Olive v. Com.*, 5 Bush 376; *Dougal and Dugald, Greenup v. Sewell*, 18 Ill. 52; *Droun and Drown, Com. v. Woods*, 10 Gray 477; *Edmindson and Edmundson, Edmundson v. State*, 17 Ala. 179; *Edward Charles and Charles Edward, Hands v. Clement*, 11 M. & W. 816; see *Haines v. Curry*, 36 Ga. 602; *Edward E. T. and E. E. T., Union Bank v. Tillard*, 26 Md. 446; see *Graham v. State*, 40 Ala. 659; *Edward and Edwin, Mann v. Birchard*, 40 Vt. 326; *Grant v. Clapp*, 106 Mass. 453; *Elbertson and Elbersen, Elbersen v. Richards*, 13 Vr. 70; *Ellen and Helen, Taylor's Case*, 20 Gratt. 829; but see *Thomas v. Desney (Iowa)*, 10 N. W. Rep. 315; *Emmens and Emmonds, Lyon v. Cain*, 36 Ill. 362; *Erlin and Erlwin, Cromwell v. Grundsen, Salk.* 462; *Farely and Farley, Leonard v.*

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Nor has the administrator power to sell the real estate. The power to sell is given, by the tenth section, to Reiser personally. The words "in fee simple," in that connection, were probably used as synonymous with "absolutely." By that section (it precedes his appointment as executor) power is given to him individually, over all the real and personal property of the testatrix, to sell it and divide the proceeds; and by the twelfth section, which also precedes the section appointing him executor, the testatrix gives to him, as executor, and to his use as such, all her property. He evidently was clothed with a trust, not with a mere power of sale. While a naked power of sale would, by virtue of the statute (*Rev. p. 398 § 11*), devolve upon the administrator, a trust, in the absence of any provision in the will that it shall do so, does not. *Brush v. Young, 4 Dutch. 237.*

Wilson, 2 Cr. & M. 589; *Faster and Foster, Foster v. State, 1 Tex. App. 533*; *Finnegan and Finegan, People v. Mayworm, 5 Mich. 146*; *Flory and Florez, State v. Florez, 5 La. Ann. 429*; *Foster and Forster, Rutland v. Forster, Cro. Jac. 77*; *Fourla and Fourai, State v. Timmens, 4 Minn. 325*; *Franciscus and Francis, Griffith v. Middleton, Cro. Jac. 534*; *Gardiner and Gardner, Rector v. Taylor, 12 Ark. 128*; *Geesler and Geissler, Cleaveland v. State, 20 Ind. 444*; *Garret and Jared, Graham v. Roberts, 1 Head 56*; *Gidines and Giddings, State v. Lincoln, 17 Wis. 519*; *Gigger and Jiger, Com. v. Jennings, 121 Mass. 47*; *Gravaier and Gravier, Rector v. Taylor, 12 Ark. 128*; *Harman and Herman, Kahn v. Herman, 3 Ga. 266*; *Hopper and Harper, Jester v. Harper, 13 Ark. 43*; *Harris and Harrison, State v. France, 1 Overt. 434*; *Haverly and Havelly, State v. Havelly, 21 Mo. 498*; *Hearn and Hearne, Coster v. Thomason, 19 Ala. 717*; *Henderson and Henry, Henry v. Curry, 1 Abb. Adm. 433*; *Here-mon and Harriman, State v. Bean, 19 Vt. 530*; *Hinsdall and Hinsdale, Meredith v. Hinsdale, 2 Cuines 361*; *Hubble and Hubbles, Cotton v. State, 4 Tex. 260*; *Hudson and Hutson, Cato v. Hutson, 7 Mo. 142*; *Chapman v. State, 18 Ga. 736*; *State v. Hutson, 15 Mo. 512*; *Hutchinson and Hutcheson, State v. Stedman, 7 Port. 495*; *Janes and James, James v. Whitbread, 11 C. B. 406*; *Japheth and Japhath, Morton v. McClure, 24 Ill. 257*; *Jna. and Jno., United States v. Hinman, Bald. C. C. 292*; *Joacob and Jacob, Aboat's Case, 1 Mod. 107*; *Joan and Jane, Griffith v. Middleton, Cro. Jac. 425*; *Josier and Josiah, Schooler v. Asherst, 1 Litt. 216*; *Kamberling and Kimberling, Houston v. State, 4 Greene 437*; *Kay and Key, Dickinson v. Bowes, 16 East 112*; *Keeland and Kneeland, Hammond v. Reddin, Dud. (Ga.) 177*; *Keen and Keene, Com. v. Riley, Thach. Cr. Cas. 67*; *Klune and Cluin, Com. v. Gill, 14 Gray 400*; *Lancaster and Lancaster, Anon., Aley 91*; *Land and Lance, Davenport v. State, 38 Ga. 184*; *Langford and Lankford, State v. Mahan, 12 Tex. 283*; *Lawrance and Lawrence, Webb v.*



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The tenth section creates a trust to sell, invest half of the net proceeds, and pay over the interest to Joseph C. Link's children until they shall attain to majority, and then to divide. Moreover, it appears clearly, from the will, otherwise—that the testatrix confided in Reiser, for, as before stated, the power to sell is to him individually, and not as executor, and the gift of the legal title, though to him as executor, was intended to be in aid of the power previously given. The power given by the tenth section is over all the estate, real and personal, and of course extends to and covers the property mentioned in the eighth section. The trusts created by the sixth, seventh and tenth sections are not incumbent on the administrator, and the power of sale given by the tenth does not devolve on him.

The devise in the eighth section—of the testator's house, No.

Lawrence, 1 Cr. & M. 806; *Lington and Lincoln, Armstrong v. Colby*, 47 Vt. 359; *Lebrun and Lebering, Ketland v. Lebering*, 2 Wash. C. C. 201; *Litherbarrow and Letherbarrow, Letherbarrow v. Ward*, 5 Jur. 388; *Little and Lytle, Lytle v. People*, 47 Ill. 422; *Littlemore and Lidamore, Parker v. People*, 97 Ill. 32; *Loyons and Lyons, Roe v. Doe*, 32 Ga. 39; *Lutle and Little, O'Neil v. State*, 48 Ga. 66; *McConnellsburg and Connellsburg, Gibson v. Gibson*, 20 Pa. St. 9; *McDonell and McDonald, McDonald v. People*, 47 Ill. 533; *McInnis and McGinnis, Barnes v. People*, 18 Ill. 52; *McNicole and McNicoll, Reg. v. Wilson*, 1 Denison 284; *McLaughlin and McGlofin, McLaughlin v. State*, 52 Ind. 476; *Margaret N. and Margaret Ann, Dills v. Kinney*, 3 Green 130; *Marres and Mars, Com. v. Stone*, 103 Mass. 421; *Malay and Mealy, Com. v. Donovan*, 13 Allen 571; *May and Mayo, Mayo v. State*, 7 Tex. App. 342; *Michaels and Michals, State v. Houser*, Busb. 410; *Minner and Minor, Jackson v. Boneham*, 15 Johns. 226; *Mawre and Moore, Countess of Rutland's Case*, 5 Co. 42; *Montacue and Montague, State v. Montague*, 2 McCord 257; *Mordern and Modern, Langdale v. People*, 100 Ill. 263; *Moss and Morse, Litchfield v. Farmington*, 7 Conn. 108; *Murrah and Murray*,

, 11 Ala. 287; *Ogilbee and Ogilbee, Hamilton v. Langley*, 1 McMull. 498; *O'Mara and O'Meara, O'Meara v. North Amer. Co.*, 2 Nev. 112; *Palus Cheal and Paulus Cheale, Codwell's Case*, 5 Co. 42; *Owens and Owen, State v. Havelly*, 21 Mo. 498; *Patterson and Petterson, Jackson v. Cody*, 9 Cow. 140; *Peirs and Peter, Griffith v. Middleton*, Cro. Jac. 425; *Peregran and Peregrine, Dunn v. Clements*, 7 Jones 58; *Petrie and Petris, Petrie v. Woodworth*, 3 Caines 219; *Pettis and Pittis, Hutts v. State*, 7 Tex. App. 44; *Penryn and Penny-rine, Elliott v. Knott*, 14 Md. 121; *Pillsby and Pillsbury, Pillsbury v. Dugan*, 9 Ohio 117; *Pilip and Philip, Taylor v. Rogers*, Minor 197; *Poll and Polly, McAllister v. Clark*, 86 Ill. 237; *Preyer and Prior, Page v. State*, 61 Ala. 16;

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160 Rose street—is a devise of the whole property which she owned there. The property was conveyed to her by Frederic Miller, in an exchange of properties between them. When she got it, the property was all in the possession of Miller, and was all used by him for a residence and place of business. He lived in the house, and carried on his business of a butcher in the buildings on the rear of the property. He bought the property in three different parcels—first, the lot on which the house and all the other buildings (except perhaps a stable) are. The house is at the northerly corner of the lot, and the other buildings cover all the rear. That lot was forty feet front and rear, by about one hundred and seventy deep. While, as yet, he owned only that lot, Miller had access to the buildings on the

Prodestant and Protestant, *White v. State*, 69 Ind. 273; Read and Reed, *State v. Potts*, 4 Halst. 41; Redus and Reder, *Hunter v. State*, 8 Tex. App. 75; Robertson and Robinson, *Clark v. Robinson*, 88 Ill. 498; Rennoll and Rennolls, ——— v. Rennolls, 1 Chit. 659; Robert Rodger Strang and Robert Roger Strong, *In re Smith*, 10 C. B. (N. S.) 344; Roffenberg and Rifenberg, *Whitaker v. Wheeler*, 44 Ill. 440; Samul and Samuel, *Fenn v. Alston*, 11 Mod. 284; Seam and Couture, *Augur v. Couture*, 68 Me. 427; see *Labat v. Ellis*, *Taylor (N. C.)* 148; *Kuhlman v. Brown*, 4 Rich. 479; *Lambert v. Blackman*, 1 Blackf. 59; Segear and Seger, *Brunger v. Seger*, 1 Ro. 425; Segrave and Seagrave, *Williams v. Ogle*, 2 Stra. 889; Sarmine and Sarmin, *Cull v. Sarmin*, 3 Lea. 66; Seden and Soden, *Wyatt v. Barwell*, 19 Ves. 435; Shacraft and Shacroft, *Denner v. Shacroft*, Cro. Eliz. 258; Shipcott and Shapcott, *Bowen v. Shapcott*, 1 East 542; Sheals and Shields, *Shields's Estate*, 3 Lux. Obs. 174; Sinclair and St. Clair, *Rivard v. Gardner*, 39 Ill. 125; but see 1 And. 211; Sin Groon and Sin Goon, *People v. McNealy*, 17 Cal. 332; Sontay and Sunday, *Sunday v. State*, 14 Mo. 417; Sofia and Sofira, *Owen v. State*, 7 Tex. App. 329; Spangle and Spangler, *Spangler's Case*, 11 Mich. 298; Stratford and Stafford, *Wilson v. Stafford*, 2 Chit. 355; Steven and Stevens, *Stevens v. Stebbins*, 4 Ill. 25; Stoydell and Stogdell, *Dyer v. People*, 84 Ill. 624; Stormer and Stermer, *Sample v. Robb*, 16 Pa. St. 305; Symons and Symonds, *Allen v. Symonds*, 4 Mod. 347; Thonpson and Thompson, *State v. Wheeler*, 35 Vt. 261; Tinmarsh and Tidmarsh, *Homan v. Tidmarsh*, 11 Moore 231; Townsen and Townsend, *Townsend v. Ratcliffe*, 50 Tex. 148; Trobridge and Trowbridge, *Buhl v. Trowbridge*, 42 Mich. 44; Watford and Wadford, *Hayes v. State*, 58 Ga. 35; West Route and Western Route, *Huddleson v. Reynolds*, 8 Gill 332; Wanzer and Wanzer, *Wanzer v. Baker*, 4 How. (Miss.) 363; Westley and Wesley, *Proudfoot v. Lount*, 9 Grant Ch. 70; Weston and Wason, *Symmers v. Wason*, 1 B. & P. 105; Whitman and Whiteman, *Henry v. State*, 7 Tex. App. 388; Whyneard and Winyard, *Rex v. Foster*, Russ. & R. 412; Whatson and Watson, *Toole v. Peterson*,

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rear of it by means of a way of his own over it, from Rose street. He next bought a strip of land sixteen feet wide, for a passage-way from the tow-path of the canal (which is south of his lot) to the rear of his lot. The northerly line of this strip was coincident with so much of the southerly line of his lot at the extreme rear end, and the strip lay at right angles to the lot. Afterwards he ceased to use this way, and permanently closed it up. He bought another lot, adjoining both. That lot was twenty feet front and rear, and lay between Rose street and the sixteen-foot strip. Of this he fenced off a strip eleven feet wide, on the southerly side, for about half the depth of the lot, for an alley or passage-way to his buildings in the rear of the house, and having no further need of the way he

9 *Ired.* 180; Wilkinson and Wilkerson, *Wilkerson v. State*, 13 *Mo.* 91; William and Williams, *Williams v. State*, 5 *Tex. App.* 226; see *United States v. Howard*, 3 *Sumn.* 12; William and Wendelin, *Hommel v. Devinney*, 39 *Mich.* 522; William Hamilton M. and William Henry M., *Newton v. Maxwell*, 2 *C. & J.* 215; Witter and Witte, *Witte v. Meyer*, 11 *Wis.* 295; Wolley and Woolley, *Power v. Wooley*, 21 *Ark.* 462.

But not in the following ones: Agnes and Anne, 2 *Roll. Abr.* 135; Asher and Ashley, *Bates v. State Bank*, 7 *Ark.* 394; Adderley and Adderby, *Adderby v. Bouthby*, *Mo.* 407; Alvers and Albers, *Albers v. Whitner*, 1 *Story* 319; Aaron and Lamon, *Barnes v. Simma*, 5 *Ired. Eq.* 392; Abie and Avie, *Burgamy v. State*, 4 *Tex. App.* 572; Absolem Baxter and Absalom Backus, *Final v. Backus*, 18 *Mich.* 218; Alexander and Andrew, *Henderson v. Ballantine*, 4 *Cow.* 549; Ammon and Amann, *Amann v. State*, 76 *Ill.* 188; Ap Pell and Ap Bell, *Floyd v. Bethell*, *Danv. Abr.* 331; Barent and Barnard, *Duncommon v. Hysengen*, 14 *Ill.* 249; Barham and Barnham, *Kirk v. Suttle*, 6 *Ala.* 681; Barnep and Barnap, *Reg. v. Carter*, 6 *Mod.* 168; Baskervill and Baskerfield, *Macduncon v. Stafford*, 2 *Roll.* 168; Bernard and Berend, *Wilks v. Lorck*, 2 *Taunt.* 399; Bill and Bull, *Bull v. Traynham*, 3 *Rich.* 433; Bauman and Bowman, *Arbuckle v. Bowman*, 6 *Iowa* 7; Bolling and Bowling, *Com. v. Kearns*, 1 *Va. Cas.* 109; Brimford and Binford, *Entrekin v. Chambers*, 11 *Kan.* 368; Brow and Brown, *Brown v. Marqueze*, 30 *Tex.* 77; Byrly and Byerly, *United States v. Wilson*, *Bald. C. C.* 83; Burrill and Burrall, *Com. v. Gillespie*, 7 *Serg. & R.* 469; Carlton and Colton, *Colton v. Stanwood*, 67 *Me.* 25; Carrigan and Kerriken, *Kerriken v. Copeland*, 3 *Kerr* 567; Cocker and Cocken, *Finch v. Cocken*, 2 *C. M. & R.* 196; Cummins and Comyns, *Cruikshank v. Comyns*, 24 *Ill.* 602; Cousin and Cozen, *Mariot v. Mascoll*, *And.* 212; Crouch and Couch, *Whitwell v. Bennett*, 3 *B. & P.* 559; Della and Dellia, *Vance v. State*, 65 *Ind.* 460; Donald and Donuel, *Donnel v. United States*, *Morris* 141; Dunlair and Dunbar, *Breyfogle v. Beckley*, 16 *Serg. & R.* 264; Ebenezer and Edward, *Slasson v. Brown*,

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had used over the lot on which the house is, he discontinued it, and used all the property between the house and the alley fence as ornamental grounds, planting shrubbery thereon &c. He occupied the whole of the property for his own purposes of residence and business, as before stated. His slaughter-house was on the rear of the house lot. The testatrix obtained all the property from him in one transaction—the exchange before stated. It was conveyed to her by one deed. There is no evidence at all that she intended, by the devise in question, to devise anything less than the whole property. There is no building on the front except the house, and that, as before stated, is numbered 160.

20 *Pick.* 436; *Edward and Edmund, Watkins v. Oliver*, *Cro. Jac.* 558; *Latham's Case*, 1 *P. R. (Can.)* 91; but see *Flood v. Randall*, 72 *Me.* 439; *Middleton v. Findla*, 25 *Cal.* 76; *Elijah and Elisha, Robinson v. Neal*, 5 *Mon.* 216; *Craig v. Brown*, *Pet. C. C.* 139; *Elisha and Ezra, Doughty v. Conover*, 13 *Vr.* 137; *Elisha Davidson and Elijah B. Davison, Mead v. State*, 26 *Ohio St.* 505; *Emeline and Evelina, Scott v. Ely*, 4 *Wend.* 557; *Elizabeth and Isabel*, 1 *And.* 212; *Farrow and Farrar, Farrar v. Fairbanks*, 53 *Me.* 143; *Favers and Faver, Faver v. Robinson*, 46 *Tex.* 204; *Fitz Patrick and Fitzpatrick, Moynahan v. People*, 3 *Colo.* 367; *Flory and Fleurer, Imhoff v. Fleurer*, 2 *Phila.* 35; *Frances and Francis, Anon.*, 1 *Moore* 126; *Franks and Frank, Parchman v. State*, 2 *Tex. App.* 228; *Gabriel Carter and Carter Gabriel, Collins v. State*, 43 *Tex.* 577; see *Reg. v. James*, 2 *Cox C. C.* 227; *Goodwright and Goodnight, Cherry v. Ferguson*, 2 *McMull.* 15; *Grautis and Gerardus, Mann v. Carley*, 4 *Cow.* 148; *Griffin and Griffith, Henderson v. Cargill*, 31 *Miss.* 367; *Grimanda and Grimalda, Hayney v. State*, 5 *Ark.* 72; *Hemessey and Hennessey, Com. v. Mehan*, 11 *Gray* 321; *Hudgins and Hudgson, McClellan v. State*, 32 *Ark.* 609; *Hudson and Jones and Hudson and James, Gayle v. Hudson*, 10 *Ala.* 116; *Humphreys and Humphrey, Humphrey v. Whitten*, 17 *Ala.* 30; *Johua and Joshua, Boren v. State Bank*, 8 *Ark.* 500; *Jonathan McCarver and John McCravey, McCravey v. Cox*, 24 *Ark.* 574; *J. Sheppherd Diggs and James Shepard Diggs, Diggs v. State*, 49 *Ala.* 311; *Jeffery and Jeffries, Marshall v. Jeffries*, 1 *Hempst.* 399; *Jonh Gariel Tardy and John G. Tardy, Tardy v. State*, 4 *Blackf.* 152; *John Thomas and James Thomas, Coles v. Gum*, 8 *Moore* 526; see *Garner v. Weller*, 11 *Moore* 457; *John Henry Oviatt and John Hilder Oviatt, Thompson v. Oviatt*, 2 *Allen (N. B.)* 118; *Josias and Josiah, Johnson v. Cooper*, 5 *Moore* 472; *King and Ring, Anon.*, 1 *East* 180 note; *Kritler and Kladder, Brotherline v. Hammond*, 69 *Pa. St.* 128; *Labern and La Barron, Lanesborough v. New Ashford*, 5 *Pick.* 190; *Lemuel and Samuel, Loomis v. Moffitt*, 5 *Ohio* 358; *Jennings v. Wood*, 20 *Ohio* 261; *Lindly and Lindsey, Roberts v. State*, 2 *Tex. App.* 4; *Lorez and Lorey, State v. Lorey*, 1 *Brev.* 395; *Lyons and Lynes, Lynes v. State*, 5 *Port.* 236; *Mc-*

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The gift in the tenth section, to "Sethe," daughter of Joseph C. Link, is undoubtedly intended for his daughter Sarah, who was called in the family, "Sadie." The will was drawn by Reiser, who was a German. This will account for the peculiar spelling of the name. Joseph C. Link never had any children except his two daughters, Mary and Sarah.

The intention of the testatrix was that, after satisfying the legacies given in the sections of the will preceding the tenth, the residue was to be equally divided between the two daughters of her deceased brother, Joseph C. Link, who were to have half, and the two sons of her deceased brother, Caspar Link, who were to have the other half. She says the "ninth part shall

Glenn and Glenn, *Martin v. State*, 16 Tex. 240; McCarn and McCann, *Rex v. Tannett*, Russ. & R. 351; McKaskey and McCoskey, *Black v. State*, 57 Ind. 109; McMickle and Mickle, *Fenton v. Perkins*, 3 Mo. 144; McKee and McRee, *McRee v. Brown*, 45 Tex. 503; Mayo and Mayhue, *Merrick v. Mayhue*, 40 Mich. 196; Mathews and Mather, *Robson v. Thomas*, 55 Mo. 581; Melvil and Melvin, *Melvin v. Fisher*, 8 N. H. 406; Melvin and Melville, *State v. Curran*, 18 Mo. 320; Michael and Mitchell, *McGuire v. State*, 35 Miss. 366; Otha and Oatha, *Brown v. People*, 66 Ill. 344; Pike and Pite, *Barnes v. Simms*, 5 Ired. Eq. 392; Prison and Brisson, *Com. v. Huffman*, Addis. 141; Quartus and Gerardus, *Mann v. Carley*, 4 Cow. 148; Ray and Roy, *Buchanan v. Roy*, 2 Ohio St. 251; Richard James and James Richard, *Jones v. Macquilan*, 5 T. R. 195; see *Re Crawford*, 1 Myl. & C. 240; Robert and Robinson, *Dulany v. Norwood*, 4 Harris & McH. 496; Rodgers and Rodger, *McDonald v. Rodger*, 9 Grant Ch. 75; Rufus and Russell, *Pitts v. Brown*, 49 Vt. 86; Samuel and Stephen, *People v. Hughes*, 41 Cal. 234; Samuel S. G. and Daniel S. G., *Griswold v. Sedgwick*, 6 Cow. 456; see *Roe v. Derys*, Cro. Car. 563; Saunders and Launderers, *Jenne v. Jenne*, 7 Mass. 94; Schoonover and Schoonoven, *Schoonoven v. Gott*, 20 Ill. 46; Sedbetter and Ledbetter, *Zellers v. State*, 7 Ind. 659; Sensenderf and Sensenderfer, *Com. v. Bowers*, 2 Brews. 350; Shakespeare and Shakespear, *Rex v. Shakespear*, 10 East 83; Shutliff and Shirliff, *Gordon v. Austin*, 6 T. R. 611; Semons and Semon, *Semon v. Hill*, 7 Ark. 70; Seymour and Seigmund, *Scholes v. Ackerland*, 13 Ill. 650; Smith & Weston and Smith & Wesson, *Morgan v. State*, 61 Ind. 447; Sophia Sherr and Albertine Scheer, *Scheer v. Keown*, 29 Wis. 586; Sylvius and Sylvanus, *Butterfield v. Johnson*, 46 Ill. 63; Tarbart and Tabart, *Bingham v. Dickie*, 5 Taunt. 14; Thomas B. Han and Thomas B. Hanly, *Hanly v. Campbell*, 4 Ark. 562; Truman H. and Freeman H., *Farnham v. Hildreth*, 23 Barb. 277; Uterburgh and Hudiburgh, *Uterburgh v. State*, 8 Blackf. 202; William and Wilhelm, *Becker v. German Ins. Co.*, 68 Ill. 412; Willison and Williston, *Bull v. Franklin*, 2 Spears 46; Yoest and Joest, *Heil's Appeal*, 40 Pa. St. 453. Gdema Carty and Gustave de ma' Carty, *Moulton v. de ma Carty*, 6 Rob. (N. Y.) 470. See, further, 24 Alb. L. J. 444.—REP.

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have their share before the tenth part," meaning that the gifts given by the first nine sections shall be first satisfied; and she adds, "and [of] what is left, Joseph C. Link's children shall have the half part of my real estate after all [shall have] got their share (shares) what (whom) I have named before." Though by this last sentence, while it is said that Joseph C. Link's children are to have the half of her real estate, no mention is made of the personal, yet, from the preceding part of the section, it is manifest that she intended that they should have half of the residue, without regard to its character as real or personal property. No further disposition is made of the residue of the personal estate, except in the gift to Caspar's sons, of half of the real and personal property.

There will be a decree in accordance with the views above stated.

THE NEWARK SAVINGS INSTITUTION

v.

DAVID JONES'S EXECUTORS.

After a bill for the specific performance of a contract had been filed and answered, the defendant, who was a resident of New York, died. By his will, he divided his estate into five equal shares, which were to be held by his four executors and trustees for the equal benefit of his five brothers and sisters, for their lives, with remainder to their respective children. Two of the executors proved the will in New York, but it was not proved in this state. After an order in the cause, the two executors who had proved the will appeared, and, by consent of complainant, were allowed to demur.—*Held*,

(1) That their appearance estopped them from asserting that, being foreign executors, they are not amenable to suit here.

(2) That their co-executors who have not proved the will, are not necessary parties.

(3) That, under the circumstances, the *cestuis que trustent* of the executors, who are the devisees, are not necessary parties.

Bill for specific performance. On demurrer.

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Mr. J. Cross, for demurrants.

Mr. G. W. Hubbell, for complainants.

THE CHANCELLOR.

This is a bill originally brought against David Jones to enforce the specific performance of a contract between him and the complainant, for the purchase by him from it of real property in Newark. He appeared to the suit and answered. He subsequently died in New York, leaving a will, by which he appointed J. Alexander Thayer, Wilson S. Hunt, Hamilton Blydenburgh and John J. Jones, executors, and directed that his whole estate be divided into five equal parts, all of which he gave to his executors, in trust for his five brothers and sisters (one of the former is the before-mentioned executor, John J. Jones) for the respective lives of the beneficiaries, with direction to transfer the same, after their death, to their respective children &c. Messrs. Thayer and Jones proved the will in New York. It has not been proved in this state. After it had been proved in New York, an order was duly made, on application in behalf of the complainant, that the suit stand revived, and that Messrs. Thayer and Jones, as executors, be made defendants therein, in the place and stead of their testator; that the complainant have leave to file an amended bill, and that the executors, Messrs. Thayer and Jones, answer the bill or signify their disclaimer of the suit and the matter in controversy therein, in thirty days after service of a copy of the order and a copy of the amended bill, and that, in default of such disclaimer, the answer filed should be taken as and for theirs. On the same day, they appeared to the suit and waived service of process on them. The bill was subsequently amended, in accordance with the leave granted. By consent, the executors were permitted to demur, notwithstanding the terms of that order, and they have filed a demurrer, on the ground of want of necessary parties (the devisees under the will), and for want of equity. On the hearing, another ground was urged, viz., that they, being foreign executors, are not amenable to the suit; and if they were, their co-executors should

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be joined with them, although they have not proved the will. The objection that the bill has no equity, was very properly not urged on the hearing. The executors are necessary parties, since the purchase-money has not been paid. *Pomeroy on Cont.* § 488. Those who have proved the will have appeared in the suit, and are therefore obviously deprived of all objection on the ground that they are foreign executors. They insist that, if they themselves are proper parties, those who were appointed co-executors with them, by the will, should be made parties also. But the latter have not proved the will. It was admitted in open court, on behalf of Messrs. Thayer and Jones, as appears by the above-mentioned order, that they alone have proved the will. The others have not accepted either the office of executor or trustee, and therefore are not proper parties. The devisees are necessary parties. *Pomeroy on Cont.* § 496. But they are the executors themselves, to whom, as before stated, the entire estate is given in trust. The devisees are therefore parties now, and it is not necessary to make their *cestuis que trustent* parties, since no question can arise as to the power of the trustees to execute the contract (which was made by the testator), or their authority to act under it. *Fry on Spec. Perf.* § 99; *Van Doren v. Robinson*, 1 C. E. Gr. 256.

The demurrer will be overruled, with costs.

THE NEW YORK FIRE INSURANCE COMPANY

v.

WILLIAM A. TOOKER et al.

1. On bill to set aside a sale as fraudulent, it is not enough to show that the vendor intended to defraud his creditors, but the further fact must be shown that the vendee was either an active or passive participant in the fraud of the vendor.

2. To constitute him such participant, it is not necessary to show that he

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had direct or positive knowledge of the fraudulent purpose of the vendor, but it will be sufficient to show that he had notice of such facts and circumstances as would naturally lead up to a strong inference of fraud.

3. Where special relief is sought in a bill, and not specifically mentioned in the prayer, and the proofs make a strong case for the granting of such relief, equity will order an amendment of the prayer, and make a decree in accordance with such amendment.

The complainant brought suit in the supreme court against the defendant Tooker, to recover \$5,000 and interest, due on a promissory note. On July 30th, 1881, by order of a justice of the supreme court, the complainant entered judgment over the pleas filed by the defendant Tooker, and on the same day the sheriff of Essex county levied upon the goods and chattels of Tooker, in his clothing store. On the 1st day of August following, the defendants Derby, Sprague and Brown filed a claim of property with the sheriff, and on the 15th of August complainant's judgment and levy were set aside by order of the court. On the 12th of September following, a verdict was found in the Essex circuit for the complainant for \$6,826.30, and judgment entered thereon, and the *fi. fa.* issued thereon being returned unsatisfied, the complainant filed its bill to set aside an alleged sale made by Tooker to the defendants Derby, Sprague and Brown.

Prior to the alleged sale, set up in the answer, the defendant Tooker had been for some time negotiating for a sale of his goods and chattels to Hall, Bailey and Brown, for the sum of \$20,000, \$4,000 to be paid in cash by Hall and Bailey, and the balance, \$16,000, in the notes of the firm, and Tooker had on the 29th of July, in his possession, notes made in the name of Hall, Bailey & Co., for \$16,000. He, in this transaction, claimed to be acting as the agent of Brown, although Brown, in his testimony, denies all knowledge of the transaction. The attorney of Hall having learned of the pendency of complainant's suit against Tooker, the negotiations were broken off and the notes returned about noon of July 29th. Tooker, as he alleges, immediately sold the same property to the defendants Derby, Sprague and Brown, for \$17,463, Derby and Sprague being clerks in his employ at that time, Derby putting in \$500 capital

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by surrendering to Tooker his own note for that amount, Sprague putting in \$200 represented by Tooker's note to his wife, and Brown, for whom Tooker again acted as agent, advancing through him, on the 1st of August following, as his share of the capital, Tooker's notes for \$4,600, and the balance was secured by notes of the alleged firm signed on the evening of July 30th, but dated July 29th, 1881. Tooker testified that he was insolvent on July 29th, being in debt \$30,828, besides the complainant's judgment, which he declined to recognize as a debt, and that he more especially sold out to make good a trust fund, which he regarded as sacred, left by his wife to his children, \$5,300 of which he had employed in his business.

At the time of the sale there had been no communication between Derby, Sprague and Brown, with reference to this sale, the price or terms, or about a copartnership. In all these matters Tooker claimed to be acting, and acted, for Brown.

When the deputy sheriff made his levy on the 30th of July, the defendant Derby, who was present in the store, admitted that the goods levied on were the property of Tooker, and that the business was then carried on for him, or as it is stated in the admission of the defendants in their answer, the sheriff having asked the defendant Derby to whom the goods in the store belonged, he was unable to answer whether in point of law the title to the said goods had passed to them or not, but in their ignorance of legal proceedings, or what was requisite to pass the title to said goods or to make a binding bargain, and supposing that because they had not fully paid for said goods and had not received a bill of sale, therefore their own title thereto was not completed, and being very much confused and embarrassed by the demand made by the said deputy sheriff, the defendant Derby did say to the said deputy sheriff, that the goods were the goods of the said Tooker, and the business was carried on for him. The defendants, in their answer, further admit that the agreement to purchase these goods, alleged to have been made on the 29th of July, was completed on the 1st day of August following, by receiving from Tooker the bill of sale for the goods.

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Mr. James W. Vroom, for complainant.

Mr. T. N. McCarter, for defendants Derby, Sprague and Brown.

VAN FLEET, V. C.

The evidence leaves no doubt whatever on my mind that Tooker was controlled by a fraudulent purpose in making the sale in question. It was made the day before the complainant was entitled to a judgment for a debt that Tooker says he did not recognize. It was made for nearly \$3,000 less than he could have realized for the same goods from other parties, but who would not purchase unless the debt due to the complainant was paid, or some arrangement was made respecting it, which would relieve its purchase from the danger of its being challenged. It was made, as Tooker says, to raise money to make good a trust fund, which his deceased wife had left to her children, and which he had imperiled by embarking it in his business. How this trust was created, whether it was a mere invention of Tooker's, devised when he was confronted by insolvency, to enable him to rescue something from his creditors for his family, the court has no information. That a trust existed, or that he was a trustee, has no other support in the evidence than the following statement by Tooker :

"I sold out especially to make good a trust fund ; * * * it was money that my wife had left her children, and such things that had come into my possession, that I had used in the business, and I looked upon it as a sacred trust."

The amount of this fund is stated to have been \$5,000. With regard to this claim, I am required to say that there is not a particle of evidence tending to show that it had the slightest existence either in law or morals.

Tooker's insistment that the sale should be carried through, after he found the goods had been levied on, notwithstanding the admission of one of the purchasers that Tooker was still the owner of the goods, renders his object in making the sale con-

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spicuously clear. Hé, undoubtedly, intended to place the goods beyond the reach of the complainant.

I consider the proof in demonstration of the fact that Tooker wanted to sell for the purpose of defrauding the complainants, as conclusive.

The evidence upon the other question of the case, namely, did the vendees knowingly help Tooker to carry out his purpose to defeat the complainant in the collection of its debt? I regard as almost equally clear.

Now, in a case of this kind, it is not enough to show that the vendor made the sale with intent to defraud his creditors, but the party seeking to set the sale aside must show, in addition, that the vendee was either an active or passive participant in the vendor's fraud. He must show, either that the vendee had direct information that the vendor desired to make the sale to defraud his creditors, or that the vendee purchased with notice of facts and circumstances from which the fraudulent purpose of the vendor was a natural and legal inference. *Atwood v. Impson*, 5 C. E. Gr. 150; *Tantum v. Green*, 6 C. E. Gr. 364; *Merchants Bank of Newton v. Northrup*, 7 C. E. Gr. 58.

I shall assume that the vendees, in this case, did not know that Tooker was insolvent up to the 29th of July, 1881, at noon, and that they did not hear of the complainant's debt until July 30th, 1881. At noon, on July 29th, 1881, is the time fixed by both vendor and vendees, when the sale under which the defendants claim was made. Was a sale, full and complete, made at that time? That I regard as the decisive question of the case.

The alleged purchasers were Nicholas Derby, William H. Sprague and Ezra Brown. The notes given on the evening of July 30th, though dated on the 29th, in execution of the purchase, were made by the firm name of Derby, Sprague & Co. At that time no copartnership had been formed by these three persons, nor did any other business relation exist among them. Prior to the purchase, no agreement of copartnership had been made, nor, as far as appears, had any negotiation ever taken place among them upon that subject. All that had ever passed

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between them, so far as the evidence shows, was, that they had expressed to each other, or at least Derby and Brown had expressed to each other, a mutual desire to buy Tooker's stock of goods. Brown was not present at the sale, nor did he know that a purchase by himself, in connection with Derby and Sprague, was contemplated until after the alleged sale was actually concluded. And what is still more remarkable, in my estimation, is the fact that this same Brown, only the day before figured as a member of another firm, which had been formed, without his knowledge, for the purpose of purchasing the same stock of goods. At the time it is claimed that the sale in question was effected, it is clear that no such relation or association existed between Brown on the one side, and Derby and Sprague on the other, as gave Derby and Sprague any right or authority to bind Brown, or to act or speak for him.

But this difficulty is attempted to be overcome by showing that Brown, some time before, notwithstanding the fact that if a sale was made Tooker must be the vendor, had given Tooker authority to act for him, as his agent, in the purchase. I find it impossible to believe that any man in the full possession of his senses would enter into an arrangement whereby he appointed the person of whom he expected, in conjunction with others, to make a purchase, as his agent. I regard it as a thing incredible that any rational man, in an enterprise of this kind, would, in the selection of an agent, take a person as his agent whose interests were strongly antagonistic to his, in preference to another whose interests were identical with his. It is barely possible that the statement is true, but if it is, I venture to say it is the first instance of the kind that has ever occurred.

I think the fact that no copartnership or other union or association existed among the vendees on the day it is alleged the sale was made, must be regarded as furnishing very cogent evidence that no sale, in fact, was made. But evidence of even a more convincing character is furnished on this point. The defendants, by their answer, admit that Derby stated to the sheriff on the 30th of July, when he came to levy upon the goods under the complainant's execution, that the goods were the prop-

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erty of Tooker, and that the business was Tooker's. Such an admission, except it was made under very extraordinary circumstances, should be regarded as conclusive.

But it is now attempted to be shown that this admission was false, and it is insisted that the defendants should not be bound by it, because Derby made it while in a state of fright and confusion, and under a belief that it was necessary for him to do so in order to escape litigation. With my views of human nature, the interpretation sought to be put upon Derby's conduct cannot be accepted as either natural or reasonable. Ordinarily, men under the influence of surprise or fright do not tell falsehoods rather than the truth, especially in cases where it is apparent to the meanest comprehension that the truth will serve them better than falsehood. Falsehood, as a general rule, requires study—there must be time for invention—an imaginary state of facts, either in whole or in part, must be substituted in the place of the actual facts of the case, and, with the ordinary mind, this requires time and effort, but not so with the truth—that may be told by simply giving oral expression to what the mind already knows and clearly comprehends.

I confess I find it impossible to believe that Derby's admission did not express what he believed to be the truth respecting the ownership of the goods in question. I think if he had understood that a definite and binding contract of purchase had been made, such as gave him a title to the goods and rendered him liable for their price, that the moment an attempt was made to seize them for the debt of another, his natural opposition to injustice and love of his own would have constrained him to have asserted his rights, no matter how great his fear of litigation or bewildering his confusion. I am bound to deal with this matter in the light of ordinary experience, and to reject any theory which presents a phase of human conduct contrary to common experience. I do not believe that the average man will tell a lie when he can plainly see that the truth will much better serve his purposes.

The transaction which the defendants insist should be upheld as a valid sale is marked by a great many other circumstances

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which naturally tend to excite strong suspicion, but which it does not seem to me to be necessary to point out or decide. The decisive fact against the claim made by the defendants is, in my judgment, the total absence of anything like a prearrangement among the purchasers for association or joint action prior to the alleged sale. Without such prearrangement, it is obvious, a purchase by the three was a legal impossibility. If it were possible to believe that Brown appointed Tooker his agent to represent him in a sale to be made by Tooker to Brown and others, such agency certainly would confer no authority upon Tooker to enter into an agreement of copartnership with Derby and Sprague, or any other contract for joint action. He does not pretend that he made a contract of that kind for Brown.

My conclusion is, that no sale was made on July 29th, and that if any was made at all, it was not made until after Tooker's return from Nyack, on the evening of July 30th. The purchasers at that time had full notice of the complainant's debt, and of Tooker's determination to escape its payment. They knew that he falsely insisted that a sale had been made on July 29th for the purpose of placing the goods, if possible, beyond the reach of the complainant's execution. On the 30th of July they made no claim that they were the owners of the goods until after Tooker told them they had purchased them and were in possession of them. So eager were they to assist Tooker in rescuing the goods from the complainant, that it does not seem to have occurred to them that they might fortify their title against the complainant's claim by requiring Tooker to pay it, as a condition on which the sale should be completed. Perhaps they knew that the sale made on the day previous had been abandoned because Tooker refused to pay complainant's debt out of its proceeds. Plainly stated, the case of the defendants is this: they carried through a sale which had been initiated but not completed, after they had full notice of the complainant's claim, and after they were informed in the most unmistakable manner, that the vendor's object in making the sale was to defeat the collection of the complainant's claim. It is hardly necessary to say that vendees occupying this position have no

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right to lay claim to the character of innocent purchasers. A purchaser, to be able to maintain his title against the creditors of his vendor, must not only be a purchaser for value, but a *bona fide* purchaser.

In my opinion, the complainant is entitled to a decree nullifying this sale. In order to make such a decree conform to the special relief sought by the bill, the prayer of the bill must be amended by the insertion of a prayer that the sale be set aside. Leave to amend in this respect will be granted. I think the complainant is also entitled to the appointment of a receiver. Since the defendants have been in possession of the goods they have sold part of them, probably the most of them. The complainant is entitled to the proceeds of these sales, or at least to so much of them as may be necessary to pay its judgment. A receiver will be appointed to take possession of the goods undisposed of, and also to collect of the defendants as much of the proceeds of the sales made by them as may be required to pay the complainant's judgment.

The complainant is entitled to costs.

SAMUEL M. DICKINSON

v.

THE CITY OF TRENTON.

1. A second encumbrancer cannot compel the holder of a first lien to redeem the second, or be foreclosed.

2. The actions of debt limited by the statute of limitations are those only growing out of contract, or such as are given by statute for the enforcement of penalties.

3. Where an action of debt is given for the enforcement of an assessment made for special and peculiar benefits, and the assessment is made a lien on the land benefited, a failure to sue for six years after the right of action accrues, neither bars the action nor extinguishes the lien, unless the statute authorizing the assessment so provides.

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On demurrer.

Mr. William L. Dayton, for demurrant.

Mr. S. Meredith Dickinson, contra.

VAN FLEET, V. C.

The questions presented for consideration in this case arise under the charter of the city of Trenton.

The complainant acquired title to the land in question under the foreclosure of a mortgage bearing date November 30th, 1872. Title was made to him September 28th, 1878. An assessment for special and peculiar benefits was made against the land in controversy for part of the cost of a local improvement, on the 17th of August, 1869. The statute under which this assessment was made declared that any assessment made by virtue of it should be a lien on the land against which it was assessed, for the satisfaction of any judgment which might be obtained on the assessment; and it also provided that the payment of the assessment might be enforced by an action of debt in any court of competent jurisdiction. *P. L. of 1866 p. 399 § 80.* By a subsequent statute, the city of Trenton was authorized to make sale, for a term not exceeding fifty years, of any land against which an assessment had been made under the act of 1866, and which remained unpaid. *P. L. of 1874 p. 373 § 83.* The lands in question were, on the 15th of April, 1878, sold to the city of Trenton for a term of fifty years, under the statute last cited.

The suit in which the decree was made under which the complainant acquired his title, was commenced March 31st, 1876, and final decree was made therein June 26th, 1876. The city of Trenton was made a party defendant to that suit, in consequence of the levy of certain taxes on the lands in question, but not, so far as the present bill shows, because of the assessment now sought to be brought in judgment. The present bill does not show that the assessment now under consideration was in

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any way questioned or even alluded to in the bill by which that suit was commenced.

The purpose of the present suit is to compel the defendants to redeem the mortgage under which the complainant acquired title, or to be foreclosed of all right to or equity of redemption in the lands in question. The defendants have demurred, and thus the question is presented—do the facts just recited entitle the complainant to the relief he asks?

I know of no rule of law or equity which entitles a second encumbrancer to call upon the holder of the first to redeem the second or to be foreclosed. There can be no doubt, I think, that the assessment is a lien. The statute under which it was made makes it so by express words. I think it is equally clear that it is prior, in point of time, to the mortgage under which the complainant holds. It was made more than three years before the mortgage was executed. The method provided, originally, for its enforcement, was an action of debt. No action was brought to enforce the assessment within six years after it was made; no suit has been brought at any time; hence, the complainant contends that not only has the right of action been lost, but the lien is also extinguished. I cannot accept either conclusion as correct. The actions of debt limited by the statute are those only growing out of contract, or such as are given by statute for the enforcement of penalties. An assessment of the kind under consideration is neither a debt nor a penalty. While it is not, in the ordinary sense of that term, a tax, yet it is the result of the exercise of the power of taxation. The statute of limitations contains no provision expressly limiting the period within which actions shall be brought to enforce such impositions, and, it is said, the period within which they may be brought is usually fixed by analogy, the time limited being that fixed by statute within which mortgage and judgment liens may be enforced. *Cooley on Taxation* 488. There can be no question, I think, that the assessment is a valid lien, and stands first in order of priority as between it and the mortgage under which the complainant holds.

Liens of this kind, being fastened upon the land by statute,

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adhere to the land against all persons subsequently acquiring either title or liens. The lien follows the land into whose hands soever it may fall, regardless of the fact whether they take with or without notice. Notice of the existence of the lien is wholly unessential to its validity against a subsequent owner or encumbrancer. *Cooley on Taxation* 488.

The lien of the defendants being superior to that of the complainant, he has no right to ask that they be required to redeem his or be foreclosed.

The demurrer must be sustained, with costs.

THE CAPE MAY AND SCHELLENGER'S LANDING RAILROAD
COMPANY

v.

THE CITY OF CAPE MAY.

1. There can ordinarily be no judicial restraint or interference with municipal corporations in the *bona fide* exercise of powers, legislative or discretionary in their nature, provided private rights are not violated.

2. But when the corporation has fulfilled its legislative functions, and exercised its legislative discretion, and is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene.

3. The repeal of an ordinance will not operate to disturb private rights vested under it.

On application for injunction, heard on bill, answer and order to show cause.

Mr. S. H. Grey, for complainants.

Mr. Peter L. Voorhees, for defendants.

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VAN FLEET, V. C.

This is an injunction bill. The complainants seek to have the common council of the city of Cape May prohibited from passing a certain ordinance. On the 21st day of May, 1881, an ordinance was regularly passed and approved, authorizing the complainants to construct a horse railroad, with the necessary turnouts, through certain streets of Cape May. The complainants, under the authority thus given, proceeded to construct their road. When the road was nearly completed, an ordinance was introduced repealing portions of the prior ordinance, and revoking the authority given to the complainants to use certain streets, in the construction of their road. This ordinance has been read a second time, and is about to be put on its third reading and submitted to a final vote. The complainants ask that the common council be enjoined from passing it. It is not averred, or shown, that the city authorities intend, in the event that the repealing ordinance is passed and takes effect, to order the track of the complainants removed, or to tear it up. The bill simply alleges that unless the common council are restrained, they will pass the ordinance. Under the provisions of the charter of Cape May, before an ordinance can take effect as a law, it must be passed by the common council, be approved by the mayor, and then be published for two weeks in the newspapers of the city.

Whatever doubts may have before existed, respecting the power of the courts to control the acts of municipal corporations, they seem now to be at rest, and the line defining in what cases they may intervene, and in what they should not, seems to be marked distinctly and with precision. The rule upon this subject is stated with perspicuity by Judge Dillon, as follows:

"There can, ordinarily, be no judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights." 2 *Dillon on Mun. Corp.* (3d ed.) § 908.

Chancellor Zabriskie, in speaking upon the same topic, says: "All legislative acts, or exercise of discretionary powers, within their authority, are beyond the control of the courts, however un-

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wise, or impolitic, or even when done from corrupt motives, or for unworthy purposes. Their legislative powers are, when exercised within their authority, supreme. But when the corporation have fulfilled their legislative functions, and have exercised their legislative discretion,"—and are about carrying their legislation into execution, then, if the effect of their act is to violate vested rights or inflict irreparable wrong, the courts may properly intervene. *Bond v. City of Newark*, 4 C. E. Gr. 376, 384. Vice-Chancellor Dodd gave expression to similar views in *Schumm v. Seymour*, 9 C. E. Gr. 143, 147.

There is no difficulty whatever in applying this rule to the case in hand. It falls, indeed, directly within it. The court cannot grant the complainants' application, unless it is willing to attempt to control the defendants in the exercise of their legislative authority. It may be that the act the defendants propose to do will be without legal force. That, unquestionably, will be its condition if its effect is to take away any rights previously granted. The repeal of an ordinance will not operate to disturb private rights vested under it. 1 *Dillon on Mun. Corp.* (3d ed.) § 314. But on this application, the court has nothing to do with the effect of the proposed ordinance. The question to be answered now is, can the court interdict its passage? Both principle and authority oppose the exercise of such power by the court.

Had the defendants in this case admitted, as did the defendants in *Paterson and Passaic H. R. Co. v. City of Paterson*, 9 C. E. Gr. 158, that their purpose in introducing the repealing ordinance was to pass it, in order that they might, under its authority, tear up the complainants' track, then, inasmuch as it would have clearly appeared, by the confession of the defendants, that they had, in advance of the passage of the ordinance, determined to do the complainants an irreparable wrong, and simply used the ordinance as a means to an unlawful end, I should not hesitate to advise that the course adopted in that case should be taken in this. The defendants in that case openly avowed that they intended to pass the ordinance for the purpose of depriving the complainants of their vested rights. No such

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purpose is averred or shown in this case. On the contrary, I think the court is bound to believe, upon the facts before it, that the defendants are acting in good faith, and with an honest purpose to put the question in dispute between themselves and complainants in such form that it may be judicially decided. Unless the defendants are allowed to pass the repealing ordinance, the question whether it is valid or not can never be raised. That is a question belonging exclusively to another tribunal, and consequently it seems very clear to my mind that this court should do nothing which shall prevent either party from presenting that question to the appropriate tribunal for determination.

The injunction will be refused, and the complainants' bill dismissed, with costs.

THE CAPE MAY AND SCHELLINGER'S LANDING RAILROAD
COMPANY

v.

ELDRIDGE JOHNSON et al.

1. A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain.

2. It is an established rule of the court of chancery that it is not open to any party to question the orders of the court, or any process issued under its authority, by disobedience; and even where the order is improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority.

3. An attempt to justify such disobedience by showing that the act was committed after consultation with counsel, and upon his advice to disregard the notice, will afford the defendants neither justification nor palliation.

On application for an order adjudging the defendants guilty of contempt &c.

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Mr. S. H. Grey, for complainants.

Mr. Peter V. Voorhees and *Mr. Peter L. Voorhees*, for defendants.

VAN FLEET, V. C.

The defendants are before the court on a charge of contempt. On the 20th day of June, 1881, an order was made directing the city council of the city of Cape May to desist and refrain from passing a certain ordinance, and also to show cause, at a subsequent day, why an injunction should not issue restraining the same act. The order was granted at Newark about midday on the day of its date. The council, it was understood, were to meet on the evening of the same day for the purpose of doing the act which the order was intended to restrain. The distance between the point where the order was made and the point where the defendants were to meet, rendered an actual service of the order impossible before the next day. Notice of the fact that an order had been made prohibiting the passage of the ordinance was sent to the president of the council by telegraph, which he received before the council convened on the evening of the 20th, and afterwards read to the council in open meeting. A special messenger, sent by the complainants, gave the council the same notice while they were in session on the evening of the 20th. The council the next day (June 21st) passed the ordinance.

The facts just stated are undisputed. They show that the defendants are guilty. The regularity, validity or correctness of the order contemned cannot be examined on this proceeding. While an order of a court remains in force it must be obeyed. Even if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. The rule upon this subject has been laid down with great clearness and force by Lord Truro. He says: "It is an

NOTE.—In two recent English cases, notice of the granting of an injunction, given by telegraph, was held sufficient, *Ex parte Langley*, L. R. (13 Ch. Div.) 110; *Tonkinson v. Carlledge*, 22 Alb. L. J. 123.—REP.

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established rule of this court that it is not open to any party to question the orders of this court, or any process issued under the authority of this court, by disobedience. I know of no act which this court may do which may not be questioned in a proper form and on a proper application; but I am of opinion that it is not competent for any one * * * to disobey an injunction, or any other order of the court, on the ground that such orders were made improvidently. Parties must take a proper course to question their validity, but while they exist they must be obeyed. I consider the rule to be of such importance to the interests and safety of the public, and to the due administration of justice, that it ought on all occasions to be inflexibly maintained." *Russell v. East Anglican Railway Co.*, 3 Macn. & G. 104, 117. The same doctrine, in a less amplified form, was expressed by Chancellor Vroom in *Richards v. West*, 2 Gr. Ch. 456.

The notice that the defendants had of the order, at the time they violated the command, was, according to the authorities, entirely sufficient. Where the charge is that the defendant has willfully contemned the authority of the court, all that need be shown is that he knew of the existence of the order at the time he violated it. *Haring v. Kauffman*, 2 Beas. 397. Lord Eldon held that if a defendant is in court when an injunction is granted, he has sufficient notice of it to make it his duty to respect it. He also held that if the defendant is not in court when an order for an injunction is made, but is informed that such an order has been made, by a person who was in court when the order was made, he has sufficient notice of the injunction to render him liable to punishment for its breach. *Vansandau v. Rose*, 2 Jac. & Walk. 264. The rule as thus stated by Lord Eldon was enforced in *Hull v. Thomas*, 3 Edw. Ch. 236; and *Hull v. Thomas* is cited, with approbation, by Chancellor Williamson in *Endicott v. Muthis*, 1 Stock. 110, 114.

Notice given by telegraph has recently been adjudged in England to be sufficient. The solicitor of the party obtaining the injunction, immediately after it was granted, notified the defendant, by telegram, that an injunction had been granted. The de-

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fendant disregarded the notice, and proceeded to do what the notice informed him he had been commanded not to do. The defendant was brought before the court on a charge of contempt, and Bacon, V. C., held that the telegram constituted sufficient notice, and adjudged the defendant guilty of contempt. *In re Bryant, L. R. (4 Ch. Div.) 98.*

Notice, to be sufficient, need possess but two requisites—first, it must proceed from a source entitled to credit; and second, it must inform the defendant clearly and plainly from what act he must abstain. The notice in the case under consideration possessed both requisites. It was sent by the counsel who obtained the order, and it not only informed the defendants what act the order prohibited, but warned them, if they disregarded the order, their disobedience would be a contempt of the authority of the court. There is nothing in the conduct of the defendants indicating that they had the least doubt concerning the authenticity of the notice or the truth of its contents. They made no inquiry respecting its authenticity or its truth, but say that they consulted counsel whether or not they could safely disregard it, and were advised that they could. This advice, to say the least of it, was both injudicious and dangerous. It affords the defendants neither justification nor palliation. They must be adjudged guilty of contempt.

The complainants, since the proceeding for contempt was instituted, have voluntarily brought the order to show cause why an injunction should not issue to hearing, and it has been decided against them. While the fact that the order contemned was improvidently or erroneously made, neither justifies nor excuses the defendants, it is a matter which it is proper the court should consider in awarding punishment. *Sullivan v. Judah, 4 Paige 444; Partington v. Booth, 3 Mer. 148.*

Each of the six defendants must pay to the clerk, for the use of the state, a fine of \$10, and they must also jointly pay the taxed costs of this proceeding.

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THE LEHIGH COAL AND NAVIGATION COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

1. The receiver of a railroad corporation has no power, without the authority of the chancellor, to make a contract which will bind the trust.
2. All contracts made by the receiver of a railroad corporation are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best.

On petition by Edward W. Vanderbilt and Edward W. Hopkins, and answer by Henry S. Little, receiver of the Central Railroad Company of New Jersey, and depositions taken in open court.

Mr. Holmes, of New York City, and *Mr. A. Q. Keasbey*, for petitioners.

Mr. Benjamin Williamson, for receiver.

VAN FLEET, V. C.

The petitioners, Edward W. Vanderbilt and Edward W. Hopkins, are dealers in railroad supplies. They formed a copartnership to engage in that business in March, 1881. Between the formation of their copartnership and the death of the first receiver of the Central Railroad Company of New Jersey, which occurred on the 3d day of March, 1882, they show that orders were issued to them by the purchasing agent of the receiver, for cross-ties and lumber, to an amount exceeding \$535,000. Of the amount so ordered, over \$200,000 has been delivered and paid for; an additional part has been offered to the present receiver and he has refused to receive it. Of the whole quantity ordered, over \$300,000 remains to be delivered. The following

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statement will show the character and value of that yet to be delivered, sufficiently for present purposes :

Georgia pine lumber.....	\$8,335 70
North Carolina plank and sawed timber.....	19,221 80
Cross-ties.....	135,941 87
White oak timber.....	89,221 95
White oak switch timber.....	46,186 80
White ash timber.....	2,027 87
	<hr/>
	\$300,926 99

The orders for the ties were all drawn on the same date, January 17th, 1882, and involve an outlay, as above shown, of nearly \$136,000. The present receiver having refused to accept certain of the material offered, and also notified the petitioners that he would not receive that yet to be delivered, the petitioners now apply to the court, praying that the receiver be directed to accept and pay for the material which has already been offered, and which he has refused to receive, and also that he be directed to receive that which shall hereafter be delivered under the orders, or that such other direction be given to him as shall be equitable and just, under the circumstances of the case.

Assuming that the orders issued to the petitioners are entitled to be treated as contracts, the important question is, do they bind the trust? The principle which must govern the court in deciding this question seems to me, from the very nature of the case, to be quite obvious and simple, and it is this : when a railroad corporation passes into the custody of the law, for the purpose of having its road operated and its property administered by the chancellor, for the benefit of the public and for the protection of its creditors and stockholders, neither its franchises nor its property can be legally charged with any burden or obligation without the order of the chancellor. The chancellor is in possession of this railroad. The receiver is the chancellor's officer ; he acts simply in a fiduciary capacity, and is at all times subject to the orders of the chancellor. The statute regulating the operation of railroads while in the custody of the law, de-

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clares that the receiver shall operate the road for the use of the public, subject at all times to the orders of the chancellor. *Rev. p. 196 § 106.* The chancellor may, at any time, for whatever may seem to him sufficient cause, remove the receiver, and not a dollar expended in operating the road can be allowed to the receiver, in his accounting with the trust, except by the order of the chancellor. All outlays made in behalf of the trust must either be authorized in advance, or subsequently ratified by the chancellor. Whatever is not so authorized or ratified, cannot be charged against the trust. This presents the whole argument in a single sentence. It is thus demonstrated, as it seems to me, that nothing the receiver can possibly do, by contract or expenditure, can be made effectual against the trust without the sanction of the chancellor.

The rule as to what expenditure the receiver of a railroad corporation may make, without first obtaining the approval of the chancellor, with certainty that allowance will be made therefor, is stated as follows by Mr. Justice Bradley of the supreme court of the United States, sitting as circuit judge :

“ It may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump.
* * * In extraordinary cases, involving a large outlay of

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money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed." *Cowdrey v. Railroad Company*, 1 Woods 336. This rule, it will be observed, simply prescribes what expenditures, out of the funds in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands belonging to the trust, to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them, or disregard them entirely.

This, in my judgment, is the only safe rule that can be adopted. The chancellor is unquestionably charged with the responsible and delicate duty of finally passing upon all outlays, and deciding whether they were necessary, proper or judicious, and should be allowed or not. It is a duty from which he cannot escape, and which he is bound to perform, as he is bound to perform all his other judicial duties, fearlessly, impartially and justly. There can be no doubt that the chancellor may annul or disregard any action of the receiver which seems to him to be improvident, or likely to obstruct or prevent a wise and just administration of the trust. Now, if receivers of this class are allowed to enter into engagements, independently of the chancellor, which shall bind the trust, it is easy to see that such receivers will be forced into a position, where their bias will always be very strongly in favor of the fairness, wisdom and expediency of their action, and in such a condition of affairs, it requires no prophet to foresee that many contracts will be made,

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which will have the appearance, under an arranged or fabricated state of circumstances, of being necessary or judicious, but which in fact, will be grossly otherwise, but which from the difficulties and obstructions with which the court is environed, it will be impossible, except in cases distinguished by great fraud or gross extravagance, to see in their true light, and to deal with as truth and justice demand. But this, in my judgment, is not a matter of policy, but a question of power. And, in my opinion, a receiver of a railroad corporation has no authority, without the sanction of the chancellor, to make a contract which will bind the trust.

The petitioners, in accepting these orders, acted with their eyes wide open. They knew what they were doing. They were dealing with an officer possessing very limited powers, and who was constantly subject to the orders of the power which created him. They knew that the chancellor, in obedience to the law, had taken possession of this corporation for the purpose of giving due protection to its creditors and stockholders, and that he was bound to guard their rights and interests with the most sedulous care, and to prevent everything like extravagance and waste. They must also be assumed to have known that the receiver could make no contract effectual against the trust, which was not first authorized or subsequently ratified by the chancellor. They were at liberty to decline to contract until such authority was obtained, or to require the receiver to bind himself in his individual capacity. If they chose to act without adopting such precautions as were necessary to insure them against loss, they must be understood as having deliberately assumed whatever risk attended their venture, and if it has turned out that the hazards were greater than they estimated, or that the course of events has been less propitious for them than they hoped, their miscalculations or misfortunes are not a grievance, but rather the result of their own rashness. They stand in this matter as mere volunteers, and this court should not, therefore, extend help to them, even if their condition is one of great hardship, if it must be given at the expense of those who have higher claims upon its protecting care.

But, simply deciding that these orders do not bind the trust,

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and that the court is at liberty to ratify them or disregard them, as to it may seem wise and just, does not determine all the questions presented for judgment by this application. If the material covered by these orders is reasonably necessary for the present purposes of the road, and can be obtained of the petitioners at prices as moderate as it can be obtained of other dealers, and at such times and in such quantities as will enable the receiver to make the best use of it, to refuse to receive it merely because no legal obligation exists rendering its acceptance a duty, would be both arbitrary and unjust. But the proof shows that a large part of the material in controversy is not only not now needed, but that a part of it is wholly unfit for railroad purposes, and if accepted, would never be used. The orders, taken in gross, it will be observed, cover an enormous quantity of material. Those issued for ties, on a single day, require the delivery of four hundred and fifty thousand, a number sufficient to build one hundred and eighty miles of road, counting two thousand five hundred to the mile. The proof shows that the receiver now has on hand sixty thousand more ties than will be used during the current year. Such transactions cannot be accurately and plainly described, except we say they are improvident.

When the orders are viewed in their aggregate, and it is seen that, in a single year, the material ordered of the petitioners amounted to over half a million of dollars, more than one-half of which remains to be delivered; and when it is remembered that, in most instances, the orders neither state a price nor designate a time or place of delivery, and that, so far as appears, the petitioners never, in a single instance, bound themselves to furnish the material ordered, but left themselves free to furnish it or not, as their interest might dictate, it is extremely difficult to believe that the orders were understood by either party to constitute completed binding contracts. The more reasonable theory respecting them, in view of all the facts, is, as it seems to me, that they were simply issued as notifications to the petitioners, of what material would probably be needed by the road in the future, to afford them an opportunity to make such preparation

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to furnish it, in case it should be required, as they should deem safe and prudent, but they were under no obligation to furnish it in any event, nor the receiver to take it, unless he gave a further special order, designating price and the time when delivery must be made.

There are other facts which need not be mentioned or discussed, entitled to more or less weight, the effect of which is to strengthen and confirm my conclusion. After careful and patient consideration of the whole case, my judgment is that the petition must be dismissed.

I think it is proper to state that I regarded this case as so important and novel, in most of its features, that it should not be decided without conference with the chancellor, and I am much gratified to be able to say, after conference with him, that he concurs in the principles enumerated in the foregoing opinion.

WYCKOFF BRUERE AND MARY H. BRUERE

v.

ROBERT BRUERE.

Lands were conveyed to S. in trust for the use of H. for life, "and at his [H's] decease will convey the same to his [H's] child or children or their heirs; and further, in default of such heirs, the said hereby-conveyed premises to be the absolute property of the said R., his heirs and assigns." H. is dead, leaving two children who are unmarried and without issue.—*Held*, that they are entitled to a conveyance of the lands in fee.

On final hearing on bill and answer.

Mr. J. H. Gaskill, for complainants.

Mr. P. S. Scovel, for defendant

Bruere v. Bruere.

VAN FLEET, V. C.

This case presents but a single question: What estate are the complainants entitled to have conveyed to them, in a farm situate in Burlington county, which the defendant holds upon certain trusts? The farm, in question, was conveyed by Samuel Powell to the defendant, March 27th, 1868, upon the following trusts: That he should hold the same to and for the use of Henry Bruere, for and during the term of his natural life, "*and at his decease will convey the same to his chi'd, or children, or their heirs; and further, in default of such heirs, the said hereby conveyed premises to be the absolute property of the said Robert Bruere, his heirs and assigns.*"

The life-tenant is dead. He left two children, the complainants. They are unmarried and without issue. They claim that the trustee is required, by the terms of the trust, to surrender the fee of the farm to them, while he claims that they are entitled only to the conveyance of a life estate.

The defendant is the uncle of the complainants, being the brother of their father. It is obvious, I think, that the parties to the deed have not expressed their meaning in technical language. It will be observed that if we read the trust literally, the last sentence can never have effect. It provides that if the complainants die, without heirs, that is, if they die without leaving any person capable of succeeding to their inheritance, then the farm shall be the absolute property of their uncle. Such a state of affairs cannot occur so long as their uncle is in being. To speak in the language of the deed, there can be "no default in heirs" to the complainants, so long as their uncle, or any of his blood are in existence. Hence, it is clear, I think, that the word "heirs" was not used in its most comprehensive sense. To so construe it, would render one provision of the trust entirely abortive.

Another construction may be adopted, which will give effect to each provision of the trust. The court is bound in construing an instrument, when its language may be read, fairly, in two senses, to adopt that reading which will give full effect to all of

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its provisions, in preference to a construction which will permit only part of its provisions to be carried into effect.

I think it is quite evident that the word "heirs" was used here in the sense of "issue," and that the correct legal reading of the terms of the trust, so far as they touch the question under consideration, is as follows :

" And at his decease [that is at the decease of Henry Bruere] will convey the same to his child, or children, or their issue, and further in default of such issue, the said hereby conveyed premises to be the absolute property of the said Robert Bruere, his heirs or assigns."

I have no doubt that this reading will accomplish what is the great object of all rules of construction, viz., to give effect to the intention of the parties.

Taking the construction just stated to be the true one, the question presented by this clause is this : What estate did the creator of the trust intend should be conveyed to the child or children of the life-tenant, on the life-tenant's death ? I regard it as entirely clear that it was intended that the trust should terminate on the death of the life-tenant. The direction of the deed is, "*at his death will convey the same to his child or children, or their issue.*" The trustee is to denude himself of title on the death of the life-tenant. There is no direction that he shall convey a less estate than the whole, nor is any purpose manifested to subdivide the estate, and carve out distinct interests or estates. A conveyance of the farm is directed to be made to one or more persons who are clearly designated. As a general rule, an agreement or direction to convey land, means that a conveyance of the fee shall be made. The direction is in the disjunctive ; it is to be conveyed to his child, or his children, or to their issue. If there are both children and their issue, they are not both to take—the children a part and their issue the remainder. In order to make such a construction possible, it would be necessary to change the sentence from the disjunctive to the conjunctive. Changes, as radical as that, are sometimes made, but only under

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the stress of peculiar circumstances, when it seems clear that a literal reading will defeat the intention of the parties.

The main difficulty grows out of the next clause of this instrument, which reads as follows :

“ And further in default of such issue, the said hereby conveyed premises to be the absolute property of the said Robert Bruere, his heirs or assigns.”

It is contended that this sentence, when read in connection with what precedes it, shows that the children were in no event to take a fee, but simply a life estate, with remainder to their issue, and in case the children died without issue, then with remainder to the defendant. This construction proceeds upon the notion that in order to express the intention of the creator of the trust clearly, the words “ *in default of such issue* ” should be paraphrased, as follows : “ And in case his children die without leaving issue them surviving, then the said farm shall become the absolute property of the said Robert Bruere.”

But to read the instrument in this way, would require the court to do something more than simply expound it, it would be required to declare an entirely new trust.

Now, if the defendant was to take in default of issue to the children of the life-tenant, it becomes important to inquire, at what time such failure of issue must occur in order to cast the remainder upon the defendant. It would seem to be clear that it must occur before the termination of the trust estate ; before the trustee is required to surrender the legal estate. He is required to do that on the death of Henry Bruere. So that if we say the terms of the trust make provision for the granting of different estates to be enjoyed successively, to one class a life estate and to another a remainder in fee, then, inasmuch as the rights of both classes became unalterably fixed on the death of Henry Bruere, we are bound to say, as his children had no issue at that time, that the defendant is now entitled to the remainder in fee. But, as already shown, the direction to convey cannot be read in this wise without first making a substantial change in its structure.

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It is clear, I think, that no such trust as that claimed by the defendant is expressly declared. If it can be found at all, it results from implication, and we are not at liberty to discover meaning or intent by implication, if any material provision of the instrument forbids it, or renders the meaning thus ascertained doubtful or uncertain. I think there is such a provision in this instrument. I refer to the one which fixes the time when the trust shall terminate. Whatever obscurity may surround other portions of this instrument, there is none as to the time when the trust shall end, and the defendant shall make over the legal title. Its direction is clear, plain and positive that on the death of the life-tenant, he shall convey to the life-tenant's child, or children, or to their issue. He is not to convey to both of the classes mentioned, nor by qualified estates, but the whole to one person or class. If it had happened that there were both children and their issue, when it became the duty of the trustee to convey, I think he would have been required to have conveyed to the children and not to their issue. Such, I think, is the plain direction of the terms of the trust.

The contingency for which the parties intended to provide, by the clause upon which the defendant rests his claim, was, according to my interpretation of the instrument, the death of the life-tenant's child or children, without issue, before the termination of the trust. Reading the instrument in this way, the scheme of the trust is freed from all intricacy, and made perfectly simple; it is made just such an arrangement of property as an unprofessional man would have been likely to originate.

I think the complainants are entitled to a conveyance in fee.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF

THE STATE OF NEW JERSEY,

MAY TERM, 1882.

THEODORE RUNYON, Esq., ORDINARY.

JOHN L. TURNURE et al., appellants,

v.

ELLEN TURNURE et al., respondents

1. Where a will contained the usual attestation clause, and the witnesses were not asked, on the trial, whether the testator did or did not make a publication of the instrument as his will when they attested it, but it appeared that, when they were requested to witness it, it was spoken of as the testator's will, and one witness testified that the other told him, in the presence and hearing of the testator, what the paper was, and also that the will had been read aloud, in the presence of the testator (who expressed his approval of it) and of all of the witnesses, before it was signed—*Held*, that there was sufficient evidence of publication to warrant probate.

Turnure v. Turnure.

2. Inequality, or even injustice towards some of a testator's children, in the amounts given to them by the will, does not prove undue influence. It is not enough to prove it to show interest and opportunity.

Appeal from order of Hudson orphans court, admitting to probate a paper writing purporting to be the will of William P. Turnure, deceased, and cross-appeal from an order directing payment of the costs and expenses of the litigation out of the estate.

Mr. R. Wortendyke and Mr. J. D. Bedle, for appellants.

Mr. A. L. McDermott, for respondents.

THE ORDINARY

These are appeals from the decree of the orphans court of Hudson county, admitting to probate a paper writing purporting to be the last will and testament of William P. Turnure, deceased, late of Jersey City, and an order directing that the costs and expenses of the litigation be paid out of the estate. The will is dated February 20th, 1873, and was drawn by Peter N. Horsley, a scrivener of that city, at the request of the testator, and its execution was witnessed by Horsley and two other persons, William F. Hulse and Charles Olsen. It gives to the testator's daughter, Mrs. Julia Hard, \$2,000; to his son John Lawrence Turnure, \$8,000, and all the rest of the estate to his widow and his son James H. Turnure, in equal shares, and appoints the residuary legatees executors. The testator died August 2d, 1880. He was then over eighty-three years of age. The caveators are his son John and daughter, Mrs. Hard, and the will is propounded for probate by the executors. It will be seen that it was made seven years before the testator died. Two of the witnesses to it, Messrs. Horsley and Hulse, were sworn before the court below; the other, Olsen, had left the state, and therefore could not be produced. The proof is clear that the will was drawn at the testator's request and according to his directions. He applied to Horsley on the sub-

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ject, on the morning of the day on which the will bears date, and requested him to draw it, giving him directions as to what it should contain. Horsley made an appointment with him to come to the office of the latter in the afternoon of that day, to execute the instrument, and he came accordingly. Horsley had drawn it. Just before it was signed, he read it over to him, in the presence of the other witnesses, and the testator approved of it, said he was satisfied with it, and that it was drawn up as he wanted it. He signed it in the presence of the three witnesses, who saw him sign it, and signed their names as witnesses, in his presence and in the presence of each other. And they witnessed his execution of the instrument at his request. The caveators insist, however, that the will was not duly published—that the writing was not declared by the testator to be his last will and testament, in the presence of the witnesses. But by the attestation clause, the witnesses certify that the writing was signed, published and declared by the testator to be his last will and testament, in their presence, and that they were present at the same time, and subscribed their names as witnesses in his presence. Neither of them was inquired of, on the trial before the orphans court, as to whether the testator did or did not make or assent to a declaration that the instrument was his last will and testament. Indeed, no question was asked on the subject. “There must,” says the ordinary (Williamson), in *Mundy v. Mundy*, 2 McCart. 290, “be some declaration by the testator that it was his will, and a communication by him to the witnesses that he desires them to attest it as such. But this need not be done by word; any act or sign by which that communication can be made, is enough. The scrivener, in the presence of the testator, says, ‘This is the will of A. B., and he desires you to witness it’—the testator standing by—is a sufficient publication or declaration. The form is immaterial. But the witnesses must know it is the will of the testator they are witnessing, and they must witness it at his request.” It appears by the evidence, that the will was, as before stated, read over to the testator, in the presence of the witnesses, just before it was signed, and he expressed his approval of it. It purports to be

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his last will and testament. In requesting Hulse and Olsen to witness the execution of it, the paper was spoken of as his will. Horsley testifies that the testator requested the witnesses, Hulse and Olsen, to witness his execution of the paper, and Hulse testifies that Horsley told him, in the presence and hearing of the testator, what the paper was. There is no room for doubt that the testator spoke of the instrument to the witnesses as his will, and requested them to witness it as such. Moreover, as before stated, the will was read over to him in the presence of the witnesses immediately before he signed it. He probably otherwise formally declared the instrument to be his will. But they knew it was his will, and he executed it as such, in their presence, and they witnessed it as his will, at his request. The attestation clause states that the instrument was published and declared by him to be his last will and testament, in the presence of the three witnesses. The effect of this statement is, it may be added, to throw the burden of proving that such declaration was not made, on the opponents of the will. *Mundy v. Mundy*, 2 *McCart.* 290; *Allaire v. Allaire*, 8 *Vroom* 312; *Tappen v. Davidson*, 12 *C. E. Gr.* 459; *Wright v. Rogers*, *L. R.* (1 *P. & D.*) 678. They have not shown that the certificate of attestation is untrue. It must be held that the testator duly declared the instrument to be his last will and testament. The will is proved to have been executed with all the due legal formalities.

It is further insisted, on the part of the caveators, that the testator, at the time of making the will, was not possessed of testamentary capacity, and that if he was, the will was the result of the undue influence of his wife over him, in her own favor and against the caveator. As to his capacity, it appears clearly, not only from the testimony of the two of the testamentary witnesses who were examined, but otherwise, that he was entirely competent to make a testamentary disposition of his estate. He had, previously to the day on which the will was drawn, spoken to the scrivener about drawing his will, and on that day he gave him all the particulars of the disposition he desired to make of his property, and it appears from the testimony of the scrivener,

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that the very language of the will was the testator's. It may be remarked that he was not accompanied by any one when he went to Horsley's office. The scrivener knew the testator well, and he speaks in positive language of his entire conviction that the testator was possessed of full testamentary capacity. Hulse was not previously acquainted with him, but he conversed with him on the occasion, and had an opportunity of judging of his competency. Both are very intelligent witnesses. The other testimony in the cause shows that, at that time, the testator was in the full possession of his mental faculties; that he was able wisely to conduct business transactions involving very large sums of money, and indeed there is no evidence of any importance or value against his testamentary capacity. As before stated, the will was made seven years before he died.

Nor is there any proof of undue influence. His wife appears to have been very kind and affectionate towards him, and to have been extremely attentive to his wants and comfort to the very last. In the will, he remembers all his children. His estate is all personal. To his daughter he gives but \$2,000, indeed, and to his son John but \$8,000, while he divides all the residue of his estate equally between his other son, James, and the widow. What the amount of the residue will be does not appear clearly, but out of the estate, is (it is said) to be paid to the testator's children a considerable sum of money for their legacies under the will of his second wife. The widow was his third wife. That he had reasons for the difference which he made in the bequests to his children, is evident from the testimony, but if he was possessed of testamentary capacity, and was free to do as he would in the testamentary disposition of his estate, it is not necessary to inquire for his reasons. The law guaranteed to him the right to make disposition of his property according to his own pleasure. I have not deemed it necessary to discuss the evidence, either on the subject of capacity or undue influence. There is no evidence on either head, except what is produced by the caveators. The burden of proof is on them. Capacity in a man theretofore sane, will be presumed until the contrary is made to appear, and undue influence is to be established by

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proof. As has been said, it is by no means enough to establish undue influence, to show interest and opportunity. The decree admitting the will to probate will be affirmed, as also will the order for the payment of the costs and expenses of the litigation in the orphans court out of the estate, but no costs of the appeal will be awarded to either side.

JOSEPHINE POMEROY et al., appellants,

v

ALFRED MILLS et al., executors, respondents.

1. In fixing the fees allowed to a surrogate for auditing and stating the accounts of executors &c., of estates amounting to more than \$50,000, in which case they are left, to a certain extent, to the discretion of the court, regard should be had to the work and trouble involved, and such allowance made as will be a fair and just compensation. In this case, on an estate of \$517,000, an allowance of \$750 to the court and surrogate was reduced to \$50.

2. In a case where the commissions of brokers for selling and buying stocks and securities of the estate had been paid out of the estate; and the time covered by the account was not over a year; and the assets appear to have been readily convertible, and there was no matter of especial difficulty in the settlement of the estate, an allowance to the executors of a commission of five per cent. on the estate (\$517,000) was held to be excessive, and reduced to three per cent. thereon. The fact that the executors were thereafter to raise out of the real estate and pay over to a designated trustee a large sum of money was held not to warrant an allowance in respect of such service, since their compensation depended upon their discharging the duty, and could not justly be paid until after the duty had been performed.

Appeal from allowance of commissions made to executors, and allowance to surrogate for auditing account.

Mr. T. Little and Mr. F. J. Mather, of New York, for appellants.

Mr. B. Gummere, for respondent, A. Mills.

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THE ORDINARY.

The orphans court of Morris county, on passing the final account of the executors (Messrs. Alfred Mills and Edward Pomeroy) of George Pomeroy, deceased, allowed them commissions to the amount of \$25,876.65, being five per cent. on the amount of the estate which came to their hands to be administered. It allowed for "court's and surrogate's fees on the account, auditing, stating decree and entering, recording copy &c., including drawing and posting notices of settlement and proof thereof," \$750. Josephine and Julia Pomeroy, two of the legatees, appealed from the decree by which those allowances were made. After they were made, Edward Pomeroy, one of the executors, objected to the allowances as being of far too large an amount, and moved the court for a reduction thereof. By his petition he accounted for his apparent consent to the allowance to the executors by the fact that he understood from his co-executor that the allowance would necessarily be at the rate of five per cent. The court reconsidered the matter, and by their order denied his application. The order recited that it appeared that when the account was subscribed and sworn to by the executors, the statement and prayer for allowance of the commissions appeared in the account in the very words and figures that appeared in the account as allowed; that the petitioner, in his own right and as attorney in fact for the other two residuary legatees (the appellants), had full knowledge of the account and commissions so stated; and that he, as executor, united in the prayer for commissions at the rate allowed; that there was no fraud or mistake, and that, considering the services rendered and responsibility imposed on the executors in the administration, they were entitled to the allowance. It will have been seen that the recital makes no mention of the allowance of \$750 to the court and surrogate on the passing of the account. No items of that allowance are given, and it does not appear how much of the amount is allowed to the court and surrogate respectively. Obviously the allowance is grossly in excess of what would be proper under the circumstances. In fixing the compensation of the surrogate for auditing, stating and reporting an account, the statute should

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of course be followed where its direction is positive, but where (as it is in the case of estates amounting to more than \$50,000) the matter is left, to a certain extent, to the discretion of the court, regard should be had, in exercising the discretion, to the work and trouble involved, and such allowance in excess of the amount fixed by statute should be made as will fairly and justly compensate the surrogate for his work. And beyond that the court ought not to go. For auditing, stating and reporting the account in this case, \$50 would be sufficient compensation. For the rest of the items the statute fixes the compensation, and nothing beyond the statutory compensation can be allowed.

The amount of commissions allowed to the executors is also excessive. Such of the personal property as was not delivered over to the legatees to whom it was specifically bequeathed, has been sold, but it was sold through brokers, whose commissions were paid out of the estate, and the securities which have been purchased have been bought in like manner. The time covered by the account is not over a year. The assets appear to have been readily convertible, and there does not appear to have been any matter of especial difficulty in the settlement of the estate. The executors are still charged with a duty in regard to the real estate—to raise and pay over to a trustee, the New York Life Insurance Trust Company, \$100,000, and they are to take care of the property in the meantime; and it is suggested that, in the allowance of commissions, the trouble which they may have in discharging that duty was probably taken into account. But it is quite obvious that no allowance should have been made on that account. Thus to pay the executors in advance is not only to act, to a very great extent at least, upon conjecture as to the trouble they will have in the future and the time they will be compelled to devote to the duty and the risk they will incur, but is to make compensation for duty which they may never perform at all. And if one should die or become disabled, or remove away, or refuse to act, and the other should do the duty, the former would have been paid for the discharge of duty never performed, while the latter would have done the whole duty for only half of the

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compensation allowed for it. The death or incapacity of both, to say nothing of other contingencies, may put it entirely out of their power to discharge the duty, and in such case they would have been paid for the discharge of the trust, but would not have executed it, and another trustee must be appointed, by whom the duty would be performed and for whose compensation the trust estate would of course be liable. The principles which should govern in fixing the amount of the commissions to be awarded under the statute to executors and administrators, is laid down by this court in *Wolfe's Case*, 7 Stew. Eq. 223. The compensation is to be reasonable, and is of course to be within the positive limitations of the statute. The size of the estate, and the good policy and necessity of so dealing in the matter of remuneration as not to repel those who can render valuable service in such trusts, and whose acceptance thereof is desirable, are in no wise to be left out of the account. At the same time regard is to be had, in the language of the statute, to the trouble, risk and actual pains rather than to the size of the estate. The discretion to be used by the orphans court in fixing such commissions is a judicial one, and any person aggrieved by its action in that respect may appeal to this court. *Anderson v. Berry*, 2 McCart. 232. And while, where the facts are the same and the opportunity of judging the same also, this court, in reviewing the action of that on the subject, will not reverse unless there is manifest error of judgment, it is the duty of this court to reverse where there is such error. Such is the case here. The estate is large, but the settlement has not, as before remarked, been attended with special difficulty, trouble, risk or pains. The compensation allowed is to the utmost limit of the statute. In my judgment, three per cent. on the amount received, \$517,533.01, would be proper compensation.

I deem it proper to say that I do not find that there was any unfair conduct on the part of Mr. Mills with reference to the fixing of the commissions, either in his statements to his co-executor on the subject or in any other way, or any action warranting criticism. He appears, it may be added, to have facilitated the obtaining from the orphans court of the review of their

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decision as to the amount of the allowances. The decree of the orphans court will be reversed as to the amount of the allowances under review, and those to the executors will be fixed at three per cent. on \$517,533.01, and the item of fees to court and surrogate will be taxed, the allowance to the latter for auditing, stating and reporting the account being fixed at \$50. The costs of the appeal and a counsel fee of \$100 to each side will be paid out of the estate.

CHARLES H. KITCHELL et al., appellants,

v.

SAMUEL S. BEACH, exr., respondent.

1. The statute which provides for an issue for the trial of the question of the validity of a will, by the circuit court, does not take away the right of appeal secured by the constitution; and on such appeal the issue is to be retried in the prerogative court, as fully as if the decree appealed from were based on the finding of the orphans court itself.

2. The declarations of a testatrix, either before or after the making of her will, are not competent evidence to prove fraud in obtaining it.

3. The testator's power to make discrimination in the distribution of his property, constitutes no small part of the value of the testamentary right, and therefore considerations of inequality in such distribution are not to be entertained, where there is competency and no fraud.

Appeals from decree of Morris orphans court admitting to probate three paper writings purporting to be a will and two codicils thereto, and directing payment of costs and counsel fees out of the estate.

Mr. H. C. Pitney, for appellants.

Mr. Theo. Little, for respondent.

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THE ORDINARY.

These appeals bring up for consideration a decree of the Morris county orphans court, admitting to probate the will of Miss Harriet Hoff, deceased, late of that county, and two codicils thereto, and they bring up also so much of a subsequent decree of that court as orders the payment of the costs, and a counsel fee of \$1,500 to the counsel of the caveators out of the estate. The testatrix died on the 31st of December, 1879, at her residence at Mount Pleasant, in that county. At the time of her death she was over eighty-seven years old. The will was made on the 14th of December, 1875; the first codicil October 23d, 1876, and the last April 23d, 1878.

Caveats to the admission of the will and codicils to probate were filed, and the orphans court, on application under the statute, ordered an issue, which was tried in the circuit court of Morris county. It resulted in a verdict in favor of the will and codicils, whereupon the orphans court made its decree in accordance therewith, admitting the instruments to probate, and ordering that the costs and a counsel fee of \$1,500 to the caveators' counsel be paid out of the estate. From those decrees appeals were taken to this court; from the former by the caveators, and from the latter by the proponents. The testimony in the circuit court was taken stenographically. On the hearing, the respondents moved to dismiss the appeal, on the ground that the verdict of the jury, and the decree of the orphans court thereon, are conclusive as to the merits of the controversy, and that therefore no appeal lies. The constitution guarantees to all persons aggrieved by any order, sentence or decree of the orphans court an appeal to this court. *Const. Art. VI. § 4 ¶ 3.* And the legislature has, by statute, provided for such appeal, limiting the time for the exercise of the right. *Rev. p. 791 § 176.* The statute which provides for an issue for the trial of the question of the validity of a will, does not and cannot take away the right of appeal secured by the constitution; and on appeal the issue is to be retried here as fully as if the decree appealed from were based on the finding of the orphans court itself. *Rusling v. Rusling, 8 Stew. Eq. 120.*

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By the will in question, which is a voluminous one, the testatrix made provision first, for the payment of her debts and funeral expenses; second, for the investment of \$7,000 for the benefit of her niece, Charlotte Kinney (who then lived with her), with certain limitations over; third, for the investment of \$5,000 for the benefit of her nephew, Charles Kinney, with certain limitations over; and fourth, for the investment of \$1,200 for the benefit of her nephew, John Kinney (who had been absent for some time, and of whom she had no definite intelligence) in case he should appear and claim it in two years from her death, and she provided that if he should not do so the \$1,200 should go to his daughter, Mary Totten, with certain limitations over. She then, by the fifth clause, gave to her nephew, Samuel S. Beach, \$2,000, to be paid in one year after her death, in consideration of his many acts of kindness and attention to her, and to her deceased brother and sister, Joseph and Mary Ann, and for the service he would probably render to her during the remainder of her life. By the sixth clause she gave to George W., John and Joseph H. Kinney, and Sophronia A. Riley, children of her deceased nephew, Joseph H. Kinney, \$5,000. By the seventh, to Horace B. Morehouse, son of her deceased niece, Susan M. Morehouse, \$5,000. By the eighth, to Jetur, John W., James and Frank Jackson, and Laura Frost, children of her sister's son, Stephen Jackson, \$3,000. By the ninth, she gave to the two children of George Jackson, son of her sister Clarissa, \$1,000; all those legacies given by the sixth, seventh, eighth and ninth clauses to be paid in five years from her death. By the tenth clause she directed that \$3,200 should be invested for the benefit of Margaret Canfield, daughter of her niece, Eliza Canfield. By the eleventh, she gave to Delia H. Hazard, Caroline Kitchell, Charles and Joshua M. Beach, children of her sister Jane, \$3,000 each. By the twelfth, she gave to Emily B. Cochran, granddaughter of her deceased sister Jane, \$1,000, and to each of Emily's six brothers and sisters \$400; the legacies given by the eleventh and twelfth clauses to be paid in five years from her death. By the thirteenth clause she gave to James Smith, who, as expressed in the will, had for

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many years worked for her brothers and sisters and herself with the greatest fidelity, carefulness and attention to their interests, \$300, to be paid in four years from her death. By the fourteenth, she disposed of her household furniture and wearing apparel and plate and jewelry and certain mementoes, some, which are specified, to various persons relations of hers, and gave the rest to her executors to divide them up among such of her nieces, nephews, grand-nieces and grand-nephews, as might express a desire to have part thereof, within three months from her death, as equitably as they could, or the articles would admit, having due regard to the nearness of relationship. By the fifteenth, sixteenth and seventeenth clauses further limitations are made in regard to the gifts to Mary and Charlotte Kinney, respectively, in the second and third clauses. By the eighteenth, she gave to her nephew, Samuel S. Beach, all the rest and residue of her property, real, personal and mixed, of whatever kind or wherever situated, of which she might die seized or possessed, to have and to hold, to him his heirs and assigns, to his and their use forever; but she thereby charged all her estate, real, personal and mixed, therein devised and bequeathed to him, with the payment of the legacies and annuities before bequeathed, and added as follows:

“While I do not intend to forbid the sale of the lands, tenements, hereditaments and real estate herein devised to said Samuel S. Beach, or any part thereof, I prefer that no part thereof should be sold during his life, but that the whole should go to his children in such manner as he may by will direct, or as the same might descend should he die without a will; my desire being that my debts and funeral expenses, and the legacies and annuities hereinbefore provided for, shall be paid out of my personal estate, and the rents, issues and profits of the real estate devised to said Samuel S. Beach, without any sale of the real estate for that purpose; but having full confidence in the judgment of said Samuel S. Beach, and believing that he will have due regard to my known wishes, I leave him absolutely free in every respect to dispose at any time, without limitation, condition or restriction, of the estate, real, personal and mixed, herein devised and bequeathed to him, by sale or otherwise, as he may see fit; subject however to the payment of the legacies and annuities hereinbefore given and bequeathed.”

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The next, the nineteenth, clause is as follows :

“ For the purpose of enabling my executors to raise and provide the money necessary for the payment of the legacies hereinbefore bequeathed, and for the creation of such funds as may be necessary to secure a support and maintenance for those to whose support my executors are directed to apply the income of the sums hereinbefore directed to be invested for such purposes, I authorize and direct my executors, after applying all such money, securities, or other personal property as I have not already in this will specifically disposed of, to the payment of said legacies or the creation of such funds or investments, to apply the rents, issues and profits of my real estate to the same purposes, giving them full power to collect such rents, issues and profits until such purposes shall be fully served ; and if my said executors shall not be able, out of said personal property or estate, and out of said rents, issues and profits, to provide for the payment of said legacies at the time they shall become payable and the investments of said funds, my will is that the time of payment of all such legacies as I have heretofore in this will directed to be paid within five years after my death, shall be postponed three years ; so that none of said legacies shall be payable at the discretion of my executors, until eight years after my death ; but my executors shall not have power to sell any part of my real estate herein devised to my said nephew, Samuel S. Beach, for the purpose of paying said legacies, or providing for said investments. I order and direct that my debts and the expenses of settling my estate, shall be paid out of my personal estate, if sufficient for that purpose, before the payment of any of the legacies hereinbefore bequeathed.”

The twentieth clause provides that should any of the legatees, except James Smith, present or bring any claim, bill or demand of any kind whatsoever against her estate, or those of her brother Joseph and sister Mary Ann, or by litigation or urging the sale or division of the real estate which such legatee might own in common with her, hinder, embarrass or interfere with the settlement of her estate or diminish its amount, such legatee shall forfeit the benefit of any provision made in the will for or to him or her, and the legacy given to him or her shall be divided among the other persons named in the will as legatees, and Samuel S. Beach, her residuary legatee and devisee, in equal proportions. The twenty-first clause provides for the substitution of children for deceased legatees, and declares that the term “ annuities ” is used merely to designate the provision made in the will for the investment of money for the support of per-

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sons, and that such designation is not to confer any power or right on the beneficiaries to demand the payment of any particular sum at any particular time. The twenty-second clause gives to the survivors or survivor of the executors all the powers conferred on the whole number. By the last, the twenty-third, clause, she revoked all former wills and codicils and appointed her nephew, Samuel S. Beach, of Rockaway, in Morris county, before mentioned; his son, Clarence Leslie Beach, of Newark; Ephraim Lindsley, of Dover, in Morris county, and Henry J. Carr, of Jersey City, executors.

The first codicil, after reciting that she had by the will made the bequests therein contained, and had devised the residue of her estate to Samuel S. Beach, charged with the payment of the legacies and annuities, and that by reason of the general depression in business, the residue might be burdened by such charge to such an extent as to embarrass him in providing for the payment of the legacies and annuities, orders and directs that all the pecuniary legacies, including what are called annuities in the will, except those to Charlotte Kinney, Samuel S. Beach and James Smith, abate to the extent of one-fourth of their amount for the benefit of the residue. In other respects it confirms the will.

The second codicil provides that in view of the fact that Charlotte Kinney had married since the making of the will, the whole of the interest of the \$7,000 to be invested for her shall be paid over to her and no part thereof be retained, and also that the executors may expend such part of the principal as they may think necessary for her comfortable support. It also provides that if Charlotte should die without issue, the \$7,000 shall be divided just as it would have been had the testatrix outlived her and died intestate, excluding Samuel S. Beach from the distributees on the ground that he has been otherwise provided for; and that Charles and John Kinney's shares are not to be paid to them, but are to be managed and disposed of as she had ordered in the provision made for them respectively by the will. It provides also that interest on the \$7,000 shall not begin until the end of one year from the death of the testatrix. It makes

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the following reductions: The provision for Charles Kinney made in the will is reduced from \$5,000 to \$1,200; that for John Kinney to \$500; interest not to commence until the expiration of two years from her death; the bequest in the sixth clause of the will to certain children of Joseph N. Kinney, to \$1,200; the bequest of \$5,000 in the seventh clause to Horace B. Morehouse, to \$1,200, payable in eight years after her death; the bequest in the eighth clause to certain children of Stephen Jackson, to \$1,200, payable in eight years; the bequest in the ninth clause to two children of George Jackson, to \$500, payable in eight years; the sum by the tenth clause directed to be invested for Margaret Canfield, to \$1,200; interest to begin at the end of two years; the bequest in the eleventh clause to certain children of Jane Beach, to \$1,200 each, payable in eight years; and the bequest in the twelfth clause to Emily B. Cochran to \$300, and those to her brothers and sisters to \$150 each, all payable in eight years. The legacy to James Smith is revoked, and the amount carried to the residue. It provides that the principal sums ordered in the second, third, fourth and fifth clauses of the will shall not be payable until the expiration of eight years after her death, even though the persons for whose benefit they were intended should die within that period; the principal in such case to be kept invested for the benefit of those to whom it will eventually be payable. There are also some provisions in regard to her household furniture &c. It revokes the appointment of Henry J. Carr as one of the executors.

The testatrix was one of a family of seven children, of whom two sons, Charles and Joseph, and two daughters, Mary Ann and Harriet, lived unmarried. Charles died first. Joseph died in 1871 and Mary Ann in 1872. All the property of Mary Ann came to the testatrix. The testatrix's property after death consisted of her homestead (a farm containing about sixty acres of arable land, the rest woodland), a large tract of other woodland and also some smaller lots of woodland. She had also an interest in other land containing iron ore, on which a mine capable of being worked to a profit had been opened. In addition, she had some personal property. After the death of Joseph, Mary Ann ap-

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pears to have had the principal part of the management of the property of herself and the testatrix. When she died, which was on June 30th, 1872, the testatrix was about eighty years old. From that time her affairs, especially her financial matters, appear to have been managed generally by Samuel S. Beach, her nephew, who was a man of business. He seems also to have rendered similar services to Charles, Joseph and Mary Ann in their lifetime.

That the testatrix was, when the will was made possessed of testamentary capacity, there can be no doubt. The testimony of Mr. Thomas Anderson, the lawyer by whom the will and codicils were drawn, and who superintended the execution of them, is clear on the subject, and not only is there no impeachment of her capacity, but her competency appears to have been admitted by the caveators on the trial before the circuit court, and is also admitted here. She transacted important business up to and in 1879, and her competency to do so seems not to have been questioned. The last codicil was made in April, 1878. She made a will and a codicil to it and a mining lease in 1872, and another will in 1874. She executed an agreement modifying a mining lease in 1876. She made a settlement with Mr. Halsey, her attorney, in December, 1876. She was examined as a witness in a land trial in 1877, and she executed another agreement modifying the mining lease in 1879. In all these transactions, and indeed so far as appears in none of her business matters at any time, was her capacity to do business in any way called in question. The instruments were executed with the requisite legal formalities. It is insisted, however, by the caveators that they were the result of undue influence over the testatrix on the part of Samuel S. Beach, the residuary legatee. The basis of the allegation is that in 1872 and 1874, as appears by the wills then made, both of which were drawn by Mr. E. D. Halsey, who at those periods was the legal adviser and attorney of the testatrix, she intended to divide the greater part of her property among her relatives by a distribution in accordance with the statute of descents, but subsequently to the making of those wills, Samuel S. Beach with a view to obtaining an alteration of

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her will by which he might get the greater part of the property himself, embittered her mind against Mr. Halsey, by exciting unjust and wholly unfounded prejudice on her part against him in connection with the drawing of her wills, and then induced her to make the will of 1875, by which, as has been seen, she bequeathed certain legacies and then gave the residue to him subject to the payment thereof. And further, that in pursuance of the same fraudulent design he, by depreciating her property to her, induced her to reduce the amount of the legacies by the codicil of 1876, and, in like manner and by like means, and to the like end and with the like design, caused the still further reduction of the legacies by the codicil of 1878. In this connection it is also charged that he induced her to reduce her intended bounty to Smith, her farmer, from the provision of the will of 1874 (the house and lot where he lived) to that of the will of 1875 (\$300), and by the last codicil to revoke even that gift.

The allegation of the existence of fraud, constituting undue influence, must be proved, and the burden of proof is upon the contestants. The will and codicils having been shown to have been executed, with due formalities, by a testatrix, who was clearly competent to make them, and who was apparently free to do so, and the contestants alleging that they were procured by fraud, it is incumbent on them to establish the truth of their allegation.

Undue influence is not a presumption in such a case as this, nor is it a conclusion following from the fact that the devisee to whom the fraud is imputed was interested in the change of testamentary disposition complained of, and had opportunity to exercise influence to that end. To avoid the instruments, the influence must be proved to have existed. The declarations of the testatrix, whether made before or after the making of the instruments in question, are not competent evidence to prove fraud in the obtaining of them. *Den v. Van Cleve*, 4 Wash. C. C. 262. It was so held by the supreme court in 1860, in *Boylan ads. Meeker*, 4 Dutch. 274. And that case has ever since been regarded in this state as the leading case on the subject, and as authoritative on the point under consideration. In the

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Rusling will case (a recent one) the issue was tried before the chief justice in the circuit court of Mercer county, and the law was so laid down by him, and on the appeal in this court it was so adjudged here also. *Rusling v. Rusling*, 8 Stew. Eq. 120.

There is no evidence of any coercion of the testatrix, in any way, to make the instruments under contest, or either of them. Nor is there even any evidence of persuasion, though such influence would have been entirely legitimate. There is no evidence of any misrepresentations made by Beach to her, to induce her to favor him in the testamentary disposition of her property. Nor is there any evidence that he ever made any representation to her as to the value of her estate, or any part of it. She lived for four years after she made the will, for three years after the making of the first codicil, and a year and eight months after making the second. She was visited by her friends, and her relatives had access to her during all that time. When she gave her instructions for the will and codicils, and when she executed them, she appeared to be free from all constraint and all influence. The fact on the subject of the alleged imbitterment of her mind against Mr. Halsey appears to be, that when she was about making the will of 1874, which was drawn by him, she was desirous of having two executors instead of one, as provided by the will of 1872, of which Mr. Halsey was sole executor. She proposed that Samuel S. Beach should be an executor with Mr. Halsey, but the latter refused to serve with him, and Columbus Beach was made executor with Mr. Halsey. She informed Samuel S. Beach of the matter, and he seems to have regarded the refusal to serve with him as ground for suspicion that there was something in the will that she did not understand. Mr. Halsey testifies that Beach did not see that will until he got it from him, Halsey, on her order in 1875, as hereafter stated, and he says that unless he knew from her, he could not have known of its contents or provisions. There is no proof that the communication to Beach, of the fact that Mr. Halsey had refused to serve as executor with him, led to anything more than the expression of the suspicion just mentioned. And it appears that in fact she did not fully understand the residuary clause of the

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will of 1874. When in 1875 she was about to make a new will, she sent for Judge Anderson, who was then practicing law in Dover, and who had been recommended to her by Ephraim Lindsley, an old friend of hers, to come to her and do the business for her. He came, and after conversing with her on the subject, learned from her of the existence of the will of 1874. He thereupon deemed it necessary to have that will before proceeding to draw the new one, and he made another appointment to come there after the will should have been got from Mr. Halsey. She sent an order (drawn by Judge Anderson) for it by Mr. Beach, who obtained it and delivered it to Judge Anderson. When the latter read that will over to her she said, according to his testimony, that the disposition which it made of the bulk of her estate was not in accordance with her intention, but was different from what she had intended. He says:

“At the second visit, as I recollect, when this will had been produced, had been obtained, my recollection is I read the will that it is said Mr. Halsey had prepared; I read it all over to her, and I asked her about the disposition, how she wanted the property disposed of, and what her wish was with regard to such and such property; she said with regard to what I may call the residue of the estate, which was the real estate, the farm and the mines there—when I read that over she said that that was not the way she intended to have it, and my understanding was that, as I read it and explained that to her—what it said—what the legal effect of the phraseology was—that she said she did not want it that way, and then she told me how she did want it.”

He also says that what he gathered was not that she had changed her mind, but that the scheme of that will was not in accordance with her idea; that her idea was that in some way or other Mr. Halsey had not written her will as she wanted it. His conclusion was, he says, that she probably did not clearly understand the effect of the disposal of that residuary estate, as it appeared in that will. The provision in question is found in the tenth and fourteenth sections of the will. The tenth section gives all the residue to the executors and the survivor in fee, in trust, to convert it into money, with full power to sell and convey at discretion, and in the meantime to lease the real estate, or so much thereof as can be leased to advantage, and for so long

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a time as it can be so leased to advantage; leaving the time for which it should continue to be leased, and the terms of leasing to their discretion, and in further trust to receive the rents, issues and profits, and interest and dividends of the real and personal estate, and, after deducting for taxes, repairs, insurance, debts, legacies and the necessary expenses of settling the estate, to divide the proceeds of such sales with the rents, issues, profits, interest and dividends, after carrying out the other directions of the will, among certain persons therein named or designated; all of them her relatives. By the fourteenth section it was provided that the executors might exercise their discretion in regard to the division of the residue, and might make a partial division at any time, or might wait until they should have reduced the whole to money before making division. Nor is it surprising that she did not understand the scheme. Mr. Halsey says she left the matter to him; that the plan of leaving the residue to trustees to be sold, and the proceeds divided in the discretion of the trustees, was the same substantially in the will of 1872 as in that of 1874; that he himself was never pleased with the will of 1872, because it provided for division according to the law of descents, and that he told her so; that he told her that as she had left that to him, he wanted to say exactly in the will how it should be left, and that he improved on it, but the plan was the same. In reply to the question whether she understood it, he answers, "No; I am afraid she was hardly enough of a business woman to understand the statute of descents." He says, however, that she understood the result—how the property was to be divided under that will. But, however that may have been, Judge Anderson says she told him that that scheme of disposal was not in accordance with her wishes, that she wanted to make Mr. Beach her residuary devisee, and charge him with the payment of the legacies. The legacies given by the will of 1875 amount (including that of \$2,000 to Samuel S. Beach, given in consideration of services), to over \$48,000. The first codicil reduces the pecuniary legacies, except those given to Charlotte Kinney, Samuel S. Beach and James Smith, one quarter; that is, to \$36,000 or thereabouts, altogether. Her

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reason for this, according to Judge Anderson, was that the times were hard, that property had depreciated in value, and that she wanted to reduce the amount of the legacies so as not to impose so great a burden on the residuary devisee. Judge Anderson says he talked to her some time in order to get her ideas, and that she appeared to understand, as he judged from what she said, that those legacies might be more of a burden than ought to be put on the residuary devisee. By an agreement dated September 1st, 1876, executed by her and others lessors of the mine, the royalty payable by the lessees was, in consideration of the depressed state of the iron market, very greatly reduced from that date. The first codicil is dated in October following. The testatrix's interest in the mine was the principal part of her estate. The mining stopped for want of a market in 1877 (the lessees had a right to abandon the lease on three months notice), and no money was due until after 1878. A new lease was made in 1879. The last codicil was made in April, 1878. She gave as her reason for making the further reduction of legacies and giving the extension of time made and given thereby, that the times were hard (the mine was not being worked then, because of the condition of the iron market), and that it might be that Mr. Beach, the residuary legatee, would be called upon to pay the legacies before he would have the means to pay them, and that he ought to have an extension of time, since it was uncertain when business would revive.

It is hardly necessary to say that her competency being established, no inquiry would be made for her reasons for making the changes in her testamentary disposition of her property, except in connection with the allegation of fraud. It is as much the duty of the courts to uphold the right of the owner of property to dispose of it by will according to his pleasure at his death, as it is to see to it that he is not imposed upon in the exercise of that privilege. Therefore considerations of inequality in the distribution of his estate are not to be entertained where there is competency and no fraud. Those considerations are for the testator himself, and his action on that head, if he be capable of making the testamentary disposition, and it be freely

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made, is conclusive on the subject. The power to make discrimination in the destination of the property, constitutes no small part of the value of the right. In the case in hand it appears that the testatrix desired to keep the property in the family, and to give her nephew, Samuel S. Beach, the greater part of it. Judge Anderson says that when he went to see her about drawing the will, she gave him his instructions, and he did not advise her. His language is :

“I took her directions; I went there to write her will, and not to advise her; she instructed me that she desired to give to Mr. Beach the greater part of her property, particularly the real estate; I understood, or at least I suppose, that that was the bulk of the estate; and she gave me to understand that she wished Mr. Beach to have this property, to have the real estate, and that her wish was that it should not go out of the family, and that she supposed that by the arrangement that she made, and which she instructed me to incorporate in the will, the property would remain in the family; Mr. Beach, as I understand, was her nephew; her wish was that it should remain in the family, and she wished to provide for the payment of a considerable number of legacies, considerable in number and amount, and charge the payment of those legacies upon her real estate—the real estate which she gave to Mr. Beach; that is, in general terms, the idea, the wish, she expressed to me; and I recollect asking her particularly as to this power of disposition on the part of Mr. Beach, and asking whether she desired to restrict him in the disposition of it in any way; I recollect that, because the will leaves him free to dispose of it, and I recollect that particularly, because she said that she did not wish to restrict him in any way, but she gave me to understand that her wish was that he should keep the property, that it should remain in the family, and she desired to have it expressed in her will that while she did not wish to tie his hands, and wanted him to understand that taking the property in this way, he should take it knowing what her wish was, I inferred that she believed that he would respect her wishes and carry them out.”

In view of his many acts of kindness and attention to her and her deceased brothers and sisters, and her confidence in and reliance upon him for assistance in her business affairs, as is witnessed by all her wills, and in view also of his relationship to her, it is not surprising that she should have made the disposition which she did of her estate in Mr. Beach's favor. In the great mass of evidence which has been adduced, I find neither any direct proof of any undue influence on his part nor

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any evidence from which such a conclusion can justly be adduced. It is claimed on the part of the caveators that, in his management of her affairs, Mr. Beach overreached and defrauded the testatrix. The evidence does not establish the fact. She appears to have been capable of understanding her financial matters, and, according to the testimony of Richard George, she not only understood a charge which was made against Beach of having obtained a premium for the negotiation of a lease of the mine while acting for her, but she justified him in it, and that, too, on reasonable grounds. And, moreover, according to the testimony of the same witness, she had business ability enough to be careful of her own pecuniary interest in her bargains. What her liberality towards Mr. Beach may have induced her to do is a matter of no moment in this litigation. She appears, it may be remarked, to have been generous towards her relatives. His transaction of her business and dealing with her funds seem to have been satisfactory to her, and she had the capacity to understand what they were. The question here is as to his actions towards her on the subject of her testamentary disposition of her property in his favor. Nor is the fact that by the will of 1875 a legacy of \$300 only was given to Smith, while that of 1874 contained a more valuable devise to him, and that by the last codicil the legacy was revoked, a matter of more concern. It would seem that the testatrix had some reason for a change of feeling towards Smith, and if she had not she was quite at liberty to do as she did. The fact appears in the testimony of Judge Anderson, that she herself directed that the legacy be given to Smith, and she herself directed that it be revoked. No evidence of undue influence is furnished by that matter. Nor, in the absence of proof of fraud, would the fact, if it were shown, that the testatrix greatly undervalued her property, weigh against the validity of her testamentary disposition of her estate; it appearing that she had testamentary capacity and was free to act. *Collins v. Osborn*, 7 Stew. Eq. 511. The decrees appealed from will be affirmed. Under the circumstances, the award of costs and counsel fee to the caveators out of the estate was proper,

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and the amount of the counsel fee was not excessive. The trial occupied two weeks, in addition to which much time must have been spent in preparation. No costs of the appeal will be awarded either to or against the appellants.

KATHARINA KAHL, appellant,

v.

FREDERICK SCHOBBER, executor &c., respondent.

1. Habits of drunkenness do not, of themselves, take away testamentary capacity, although such habits produced the disease of which testator died a few weeks after making his will.

2. It is not enough to deny probate to a will, that it does not appear affirmatively that it was read over to or by the testator before he executed it where it does not also appear that it was *not* read over to or by him then, and it further appears that he was then capable of reading it, and fully understood its contents, which were in accordance with his instructions, and there is no proof of fraud or imposition.

Appeal from decree of Hudson orphans court, admitting to probate a paper writing purporting to be a codicil to the last will and testament of Julius G. Kahl, deceased, and ordering the caveatrix to pay the costs.

Mr. R. B. Seymour, for appellant.

Mr. J. Garrick, for respondent.

THE ORDINARY.

Julius G. Kahl, then of Jersey City, died there August 19th, 1880. He made his will on the 3d of March in that year, and a codicil thereto on the 24th of July following. The surrogate of Hudson county admitted both instruments to probate in September, 1880. From his proceedings the appellant, the widow,

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appealed to the orphans court of that county, by which the proceedings were affirmed, and she was ordered to pay the costs. From the decree of that court, so far as the admission of the codicil to probate and the order for the payment of the costs are concerned, the appellant appealed to this court. The grounds of the appeal to the orphans court were incapacity and undue influence. From the decree admitting the will to probate, although the will was contested there, there is no appeal. It will therefore be assumed that the testator, at the time when the will was made, March 3d, was possessed of testamentary capacity, and that there was no fraud in the making or obtaining of that instrument. And, indeed, the proof fully warrants such assumption and conclusion. Between the date of the will and that of the codicil, was a period of a little less than four months. The codicil exhibits but little change in the intention of the testator. On the other hand, it was designed to effectuate his intention in the disposition of his property, which he meant to secure by his will.

The will, after directing payment of debts, gives to his son Charles \$700, to be in full of all claims by him for services rendered to the testator. He had served his father in the business of the latter for many years, and had received no compensation, except his board and clothing, and the testator intended to pay him by that legacy. The testator then gives his household furniture to his wife, and directs his executors to sell and dispose of all the remainder of his personal estate and convert it into money, and, after paying his debts and the legacy to Charles, to divide the remainder into three equal parts, and pay one of them to his wife, one to Charles, and the other to his daughter Henrietta. He had only those two children. He then provides for the sale of his business to Charles (if he should not have disposed of it before his death), if Charles should wish to buy it, and provided, also, that if Charles shall purchase it he shall not be required to pay cash for it, but shall be charged with the amount on account of his legacy. He then gives all his real estate to his executors in trust, to collect all the rents and revenues thereof until they shall sell it, and out of the rents

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to pay the taxes, water-rents, assessments, repairs, insurance and other necessary expenses thereon, and pay over the residue to his wife and children in equal shares. He provides that if his wife and Charles, or either of them, desire to occupy and shall occupy, any part of his real estate, they shall be permitted to do so at a fair rent, which is to be deducted from their respective shares of the income of his real estate; that if his daughter, during her minority, resides with her mother, the latter is to be fairly compensated for her maintenance, and he also provides that his executors shall sell his real estate when his daughter attains her majority (but may, at their discretion, do so before that time, provided it be after she shall have arrived at the age of eighteen years), and divide the proceeds equally between his wife and children. He appoints his executors, and the survivor of them, guardians of his daughter, directing that they invest her share of the personal estate, and of the income of the real estate, after paying for her support, and her share of the proceeds of the sale of the real estate, on first bond and mortgage of real estate worth double the amount invested, and transfer the investment to her with any income on hand, on her attaining to her majority. Finally he constitutes Frederick Schober and John Stratford (now deceased), of Jersey City, executors of his will, relieving them from the necessity of giving bonds as executors, trustees or guardians under the will, unless required to do so by some competent tribunal for special cause shown. By the codicil he directs that the legacy of \$700 shall not be paid to Charles until his daughter shall have attained to the age of eighteen years, unless she shall die before that time; and he directs that any money recovered from his life insurance in the masonic fraternity, to which he belonged, shall be considered part of his personal estate, and shall be applied and disposed of as his personal estate is directed to be applied and disposed of, and that if on account of any rule or order of the society it shall be paid to his wife, the amount shall be deducted from her share of his estate. The will was drawn by Mr. Garrick, at his office in Jersey City, on the instructions of the testator, who came to him there for the purpose, and it was exe-

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cuted there. The witnesses were Messrs. Garrick, Traphagen and Wright, all of whom testify on the subject of the execution. The codicil was drawn at the testator's house. He was then confined to his bed. He appears to have sent by Mr. Stratford, one of his executors, for Mr. Garrick to come to see him to make an alteration in his will. Mr. Garrick went, and found him in his room. His son was also there. The testator requested his son to leave the room, and, when he had done so, caused the door to be locked, to secure privacy until he should have finished the business on which he was about entering. When he and Mr. Garrick were there alone he informed the latter what changes he wanted to make in his testamentary disposition of his property. Mr. Garrick testifies on that subject as follows :

“He told me he wished to make a change in his will, and I did so; he wanted it expressed in the will that the legacy to his son should not be paid until his daughter should be eighteen years of age, and he also said that he had his life insured in the masonic order, and he did not know whether the will would cover that life insurance, and wanted it so fixed that the life insurance should be equally divided between his wife and his son and daughter; I asked him whether the insurance was payable to his executors or administrators, or whether it was payable to his widow in case he should die; he told me that he did not know; I told him that if it was payable to his widow he had no power to dispose of it by will; he then said if it is payable to her, and she gets it, then I want the amount deducted from her share of the estate, I then drew the codicil in accordance with his directions; he was very feeble in body, but his mind appeared to be perfectly clear; I knew nothing about this life insurance, except what he told me; when I called at the house he expressed the wish that he and I should be alone in the room, and directed me to lock the door, which I did.”

After Mr. Garrick had drawn the codicil, he told the testator that it would be necessary to have another person besides himself for a witness, and thereupon the testator called in his son and told him to go out and get some neighbor who could write his name, to come in. The son obeyed, and brought in Mr. Rosenow, who, with Mr. Garrick, witnessed the instrument. Mr. Rosenow says he saw the testator make his mark (he was too weak to write) before he signed as a witness, and he heard him

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say both before and after he signed the paper that it was a codicil to his last will and testament. He further says that the testator himself asked him to sign his name as a witness, and he adds that he believes he understood him to say that he had requested Mr. Garrick to do so. Both the will and the codicil were executed with all due legal formalities. There is not only nothing in them to excite suspicion as to the testamentary capacity of the testator, but on the other hand they bear witness to his competency. Not only do the testamentary witnesses testify to his capacity when the codicil was executed, but his physicians, Drs. Youlin and Fuller, also testify to his competency. The former attended him for eleven days in April, 1880, and again every day from June 19th to July 3d in that year, when he introduced Dr. Fuller, who attended him from the last-named day until August 19th, 1880, the day of his death. Dr. Fuller made fifty visits to him. He attended him nearly every day and sometimes more than once on the same day; and Dr. Youlin, after he introduced Dr. Fuller, visited the testator professionally on the 7th, 14th and 21st days of July. It will be seen that the testator lived for three weeks after he made the codicil. There are also other witnesses who testify to his competency. The appellant herself and her witnesses testify to irrational conduct on the part of the testator at times, but that conduct was undoubtedly the result of his indulgence in intoxicating drink, which appears to have been the cause of the disease of which he died. It is familiar law that habits of drunkenness do not of themselves take away a man's capacity to make a will. The testator was not intoxicated when he made the codicil. The caveatrix, it may be remarked, herself thought him competent at the time; for immediately after the codicil had been executed she complained that she had been excluded from the room when it was made, and in conversation with the testator on the subject she said to him that he might have let her know what he was doing, since it would have made no difference, seeing that he was at liberty to do what he pleased, whether it was satisfactory to her or not.

It is urged, however, that the codicil ought to be denied pro-

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bate on another ground, viz., because it does not appear that it was read over to the testator, or that he himself read it. But while that is true, it does not, on the other hand, appear that it was not read over to or by him. No inquiry on the subject was made of Mr. Garrick, and from the evidence there can be no doubt that the testator was able to read it, and that he fully understood its contents, and that is enough, although he may not have read it or heard it read. If, said Judge Washington, in *Harrison v. Rowan*, 3 Wash. C. C. 580, 585, evidence be given that the testator was blind or from any cause incapable of reading, or if a reasonable ground is laid for believing that the will was not read over to him, or that there was fraud or imposition of any kind practiced on him, it is incumbent on those who would support the will to meet such proof by evidence, and to satisfy the jury either that the will was read, or that the contents were known by him. In *Day v. Day*, 2 Gr. Ch. 549, 555, the ordinary (Chancellor Vroom) said on this subject that if the will can be shown to be substantially in accordance with the instructions of the testator, it may be considered sufficient evidence that he was acquainted with its contents, though he did not read it, and it was not read over to him. In the case before me, Mr. Garrick testifies that he drew the codicil in accordance with the testator's directions which he details. Mr. Rosenow, the other witness to the codicil, says that the testator, before he made his mark, "explained" to him. What he means by that expression does not appear clearly. He may mean that the testator informed him what the contents of the paper were. But however that may be, John Ferguson, who was an old and intimate friend of the testator, and who frequently visited him, testifies that within half an hour after the codicil was executed the testator told him about it, and mentioned the life insurance as a thing he had forgotten when he made the will, and said that he wanted that money divided into three parts, the same as his other property, and that he had got the lawyer who drew his will to make the alteration. There was no fraud or imposition on the testator when he made the codicil, nor is there any imputation of either; and there is no reason even to suppose that the

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codicil was not read over to him. There is no room to doubt that he was possessed of full testamentary capacity, and no proof is offered on the subject of undue influence. He appears not only to have been free to act, but to have secured himself, by excluding his wife and son from the room and locking the door, from even any intrusion while he was engaged in the testamentary act. The decree appealed from will be affirmed, and the appellant will be decreed to pay the costs of the appeal.

EDWARD C. WOODRUFF et al., exrs., appellants,

v.

HELEN M. WARD et al., respondents.

A testator directed his executors to invest certain funds in "first-class, interest-paying securities," and to pay the interest derived therefrom semi-annually to certain designated beneficiaries for life, and to pay the principal to others after the termination of the life estate of those first named. The funds at the testator's death were left by him invested in second mortgage railroad bonds, railroad stocks and bank stocks.—*Held*, that the orphans court had no power, under the one hundred and fifteenth section of the orphans court act (*Rev. p. 777*), on the application of the executors, to order that the investments of the funds be continued in the securities left by the testator, because such order is not within the object of that section of the act. The section does not apply to moneys which the fiduciaries therein mentioned are required to invest, but such as they are required to hold.

Appeal from decree of Union orphans court.

Mr. G. T. Parrott, for appellants.

Mr. E. W. Ward, for respondents.

THE ORDINARY.

The executors of Moses M. Woodruff, deceased, applied to the orphans court of Union county by petition dated June

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11th, 1881, for an order concerning the investment of certain moneys which, by the will, they were directed to invest. The petition sets out the clauses of the will under which the investment is made necessary; states that the estate, which is large, consists of real and personal property, and to a great extent of stocks and other securities; that the executors have been unable to make proper investment of the money in the securities recognized by the court as allowable for trust money in the absence of any direction of the court on the subject; that they are desirous of retaining the investments in which the personal estate came to their hands, and of having specific directions that the moneys which they by will are to invest be regarded as being duly invested therein, by and under the order of the court, and they state the particulars of the assignment of securities which they propose to make to each of the funds, and for security therefor. The securities consist of second mortgage railroad bonds, railroad stocks and bank stocks. The orphans court not only made the desired order so far as authorizing the investments was concerned, but went further, and fixed the dates of the assignments as of precedent periods, so as to comport with their views of the rights of the first takers of the funds in respect to the enjoyment thereof. The funds were three in number; two—one of \$8,000 and the other of \$7,000—were for the benefit of the two daughters of the testator for life, with limitation over, and the other \$7,000 was for the benefit of his granddaughter, the interest to be payable to her until she shall attain the age of twenty-five years, when she is to have the principal, and the fund is limited over in the contingency of her death before attaining to that age. The court directed that the assignment of securities for her be made as of the day next succeeding the day of the testator's death, which took place April 11th, 1880, and those for his daughters as of the 11th of April, 1881, one year from his death, and they directed that the costs and counsel fees of the proceeding be paid out of the estate. The executors (who are the residuary legatees) appeal from the order. The real ground of objection to the order for investment must, inasmuch as the executors themselves recommended the invest-

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ment to the court and sought from them authority to make it, be presumed to be that the court undertook to fix as dates as of which the assignment of securities for the respective funds was to be made, precedent periods, the effect of which was to give the securities to the funds at a price lower than the market value at the time of making the order, and also to give to the beneficiaries the benefit of the excess of the dividends, received by the executors on the stocks, over what they had paid to the beneficiaries as interest, which payments were made at the legal rate of interest. By the will the testator gave the funds to his executors in trust, as before mentioned, and directed them to keep them invested in first-class interest-paying securities, and to pay the net proceeds of the interest thereon to the first beneficiaries for the designated periods, and then to pay over or dispose of the principal as directed in the contingencies named.

The section of the orphan's court act (the 115th) under which the court must have acted in the matter, provides that executors, administrators, guardians or trustees may, by direction of the orphans court, put out at interest all moneys in their hands which they are or may be lawfully required to retain, whether the same belong to minors, legatees or other person or persons, upon such security and for such length of time as that court will allow, and that if the security so taken *bona fide* and without fraud shall prove insufficient, it shall be the loss of the minors or other person entitled thereto, and that it shall be the duty of executors, administrators, guardians and trustees, in cases where the estates of minors or other persons in their hands may be materially benefited thereby, to make application to that court for such direction, and that in case they shall neglect to do so, they shall be accountable for the interest that might have been made thereby. But (it is further provided) if no person who will be willing to take the money at interest, giving such security, can be found by the executors, administrators, guardians or trustees, nor by any other friend or friends of such minors or others, then the executors, administrators, guardians or trustees shall, in such cases, be accountable for the principal money only until it can be put out at interest, as aforesaid; provided, nevertheless,

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that in any case where executors, administrators, guardians or trustees use the money of minors or others which shall come to their hands, they shall not only be accountable for the principal but for the interest thereon. *Rev. p. 777.* The object of this provision of the law was to secure to beneficiaries of certain funds, which might otherwise lie idle in the hands of their fiduciaries, the benefit to arise from investing them; and it applies only to moneys in the hands of the fiduciaries, which they may be lawfully required to hold, and which for that reason they would not invest; such as money held to await the arrival of a certain time, or the happening of a certain contingency, money which they might be excused from investing by the fact that they ought reasonably to hold it in order to pay it over when duly called for. The act takes away such excuse for not investing the money, unless in addition there has been application to the orphans court in the premises, and a refusal by that court to direct the making of the investment, or a direction on their part with which it has been impracticable, for want of the necessary opportunity, to comply. And the act says that even in the latter case, if the fiduciary uses the money himself, he shall pay interest for it. It was never intended that the act should admit of a construction which would authorize the orphans court to direct the investment of moneys which the fiduciaries mentioned might be required by law not to hold, but to invest. In this case the orphans court has made an order authorizing the investment of trust moneys, which the executors by the will were expressly directed to invest in "first-class interest-paying" or "interest-bearing" (the testator uses both expressions) "securities," in securities not contemplated by the testator, nor allowed by law, but against which the testator expressly and explicitly discriminated. He had stocks and mortgages. He knew that the one bore dividends while the other bore interest. He knew what was meant by the language he used when he directed that the trust funds set apart for his daughters and granddaughter should be invested in "first-class interest-paying securities." He did not mean stocks or second mortgages. When he provided that the interest should be paid semi-annually, as he did

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in the bequests in favor of his daughters, he evidently contemplated that the fund would be invested on mortgage, on which the interest should be made payable semi-annually. Under such a direction as to investments it would be held that only such securities as the court of chancery allows for trust funds would be allowable. *Ward v. Kitchen*, 3 Stew. Eq. 31. The section under consideration has never been construed, so far as I am aware, although it is of long standing. What was said in reference to it in *Tucker v. Tucker*, 6 Stew. Eq. 235, was said in connection with the investment of moneys, which were in the executor's hands, under circumstances such as would have justified him in applying to the orphans court for directions as to the investment thereof. This case is not within the provisions of the section. It is wise to confine the scope of the act to the cases which are clearly within its terms, for though the action of the court under it is indeed discretionary, it is of such a character that it cannot, in justice to those whose interests may be affected by it, be held not to be subject to review on appeal. And if the order for investment is subject to an appeal, it is obvious that, speaking generally, no investment can safely be made pursuant to it, at least until after the time for appealing shall have elapsed, and, if there be an appeal, not then until the appeal shall have been determined. These embarrassments are worthy of consideration, in connection with the proposition that the section be construed so liberally as to extend to cases not within its terms. The decree of the orphans court will be reversed, except as to so much of it as relates to the payment of costs and counsel fees out of the estate. The executors (who, as before stated, are the residuary legatees) made the application, and all that has been done in the matter has been done in pursuance of their application. The action taken by them was not only for the benefit of the daughters and granddaughter, but for the benefit of those to whom the funds were limited over, also. The costs and expenses should, under the circumstances, be allowed as costs of executing the will, and the costs of this appeal will also be paid out of the estate, with a counsel fee of \$50 to each side.

Personette v. Personette.

WILLIAM H. PERSONETTE et al., appellants,

v.

MARY H. PERSONETTE, administratrix, respondent.

An administratrix of her husband's estate retained out of the estate money due her from her husband for money lent by her out of her separate estate to him, to be repaid with interest, and also money received by him as a deposit for her benefit out of her separate property. She also delivered to the surviving executor of an estate of which her husband was an executor certain securities found in her husband's safe after his death, and proved to be the property of that estate.—*Held*, that her action in both matters was lawful.

Appeal from decree of Essex orphans court.

Mr. F. H. Pilch, for appellants.

Mr. J. Coult and *Mr. G. D. G. Moore*, for respondents.

THE ORDINARY.

This is an appeal from a decree of the orphans court of Essex county, allowing a claim of \$595.13, made by the respondent, administratrix of Dr. Stephen Personette, deceased, against the estate of the intestate, who was her husband, and adjudging that sixty shares of the stock of the American Mutual Insurance Company, of Newark, were the property of the estate of William P. Riker, deceased (one of whose executors Dr. Personette was), and that they were properly delivered over by the respondent to the surviving executor of Riker accordingly, and therefore also properly omitted from the inventory of the personal estate of Dr. Personette. The decree was made in proceedings to declare the estate insolvent. The appellants insist that the orphans court, in allowing the claim of the widow and justifying her act in delivering over the stock, in each case, established a trust, and so exceeded its jurisdiction. The posi-

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tion is not tenable. The proof as to the debt due the widow is plenary that the money was her separate estate, and that her husband received it from her, part on deposit for safe keeping, to be returned on demand, and the rest as a loan, to be repaid with interest. She is entitled to this money as a debt due her from her husband's estate. If the claim could not be established at law, by reason of the relation existing between the contracting parties when the contract was made, it might be established in equity. *Black v. Black*, 3 Stew. Eq. 215; *S. C. on appeal*, 4 Id. 798; *Calame v. Calame*, 10 C. E. Gr. 548; *Gould v. Gould*, 8 Stew. Eq. 37; *Vreeland v. Vreeland*, 1 C. E. Gr. 512. And the indebtedness having been clearly proven, the orphans court properly regarded her claim as one in respect to which the administratrix might exercise her right of retainer as to its due proportion of the assets applicable to the payment of the debts, and therefore properly allowed it.

As to the scrip: The evidence is that Dr. Personette was one of the executors of Riker. After Dr. Personette's death, there were found in his safe various papers belonging to the various estates of which he was or had been executor or administrator. Among them was an envelope, marked in his handwriting, "Bonds and Scrip," or "Bonds and Securities" (the witness states it both ways) "belonging to the estate of William P. Riker." A few weeks before his death (he died suddenly from an accident) Dr. Personette said to his co-executor of the Riker estate that the estate was invested (he had had sole charge of it) in bonds and securities, and that if he should die his papers and books would show just what was the property belonging to that estate, and that his co-executor would know what it was by the papers and endorsements. The scrip in question stood in the name of Dr. Personette, individually. Among the papers in the safe designated as belonging to the Riker estate, was Dr. Personette's note for \$500 in favor of that estate. Because it was seven years old, the person (the attorney in fact or agent of the administratrix) who first examined the papers after Dr. Personette's death, regarded it as worthless, and therefore destroyed it. There was also an account of Dr. Personette with

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the estate, showing a balance of \$852 in favor of the estate. This was destroyed also, as being of no value or importance. The surviving executor has filed a claim of \$426, besides interest, against Dr. Personette's estate in favor of Riker's estate, and this sum is claimed to be due after crediting the scrip in question. The only question before the orphans court in regard to the scrip was, whether it belonged to the estate of Dr. Personette or to the estate of Riker. They were right in adjudging that it belonged to the latter, and constituted no part of the assets of the former. The decree will be affirmed, with costs.

GEORGE R. GREEN et al., appellants,

v.

SAMUEL GROOCK, administrator, respondent.

Where an administrator, in pursuance of a family arrangement for the benefit of the widow and children of the deceased, disposed of the property in such manner in connection with a lease on which the estate was liable, as to realize more than could have been realized by disposing of it in the usual way, taking into account the loss which the estate, but for the arrangement (part of which was the assumption of the lease), must have met on the lease—*Held*, that he was not liable under the circumstances, on certain notes taken as part of the purchase-money of the property, and which he had failed to collect.

Appeal from decree of Essex orphans court on final account of an administrator.

Mr. E. C. Harris, for appellants.

Mr. J. G. Trusdell, for respondent.

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THE ORDINARY.

Richard Green, then of Montclair in Essex county, died intestate in November, 1870. He left a widow and five minor children, the youngest of whom was seven and the oldest eighteen years of age. The respondent was appointed administrator of his estate on the 20th of December following, and William J. Best was appointed guardian of the children in May, 1871. At the time of his death, Mr. Green was a merchant doing business in a store in Broadway, in New York, in a building which he held under a lease at a rent of \$10,000 a year up to May 1st, 1871, and \$12,000 a year for two years from that date, that is, until May 1st, 1873. His business was what is called the "gentlemen's furnishing business." He had been in it, at that place and in another part of the city, for many years. He had at his death a large stock of goods in his store, together with business fixtures. The controversy between the parties is as to the liability of the administrator in reference to the stock and fixtures. They were appraised and inventoried at \$40,449.46, of which sum \$38,449.46 were for the value of the stock and \$2,000 for that of the fixtures. The administrator carried on the business for account of the estate up to the time, March 15th, 1871, when he sold the stock and fixtures to the business firm of Hutchinson & Smith, which was created at that time through the instrumentality of Mrs. Green and her friends, with a view to buying the stock and fixtures and lease, and continuing the business in the store. The firm consisted of Robert F. Smith, who had been a clerk in the store of Mr. Green, and Seymour A. Hutchinson, as general partners, and Mrs. Green as special partner. The only capital it had was \$15,000 put in by Mrs. Green. The stock and fixtures were sold at private sale to the firm at \$29,541.75. The price was made up as follows :

The amount of the appraisement less twenty per cent. discount.....	\$32,000 00
Increase of stock by purchases after Mr. Green's death.....	960 76
	<hr/>
	\$32,960 76

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Deduct amount of gross sales made after Mr. Green's death.....	\$4,329 09	
Less estimated profit of twenty per cent. thereon	865 80	\$3,463 29
		<hr/>
		\$29,497 47
Deduct also amount of rent (from February 1st, 1870, one-eighth of a year) assumed by the firm.....	\$1,250 00	
Less rent due from the under-tenant of the upper part of the building..	362 50	887 50
		<hr/>
		\$28,609 97
Add interest on notes given on account of the pur- chase-money.....		931 78
		<hr/>
		\$29,541 75

This sum was paid and secured as follows: \$10,000 were paid in cash (out of the money contributed to the concern by Mrs. Green), and for the rest, \$19,541.75, twelve notes of the firm, all dated March 16th, 1871, without security, were given. These notes were at two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen months, respectively, and were each for \$1,550.83, and the interest from the date of the note until its maturity. The partnership was to continue for five years. By the agreement the general partners might draw annually from the firm for "living expenses" \$2,500 each, and the special partner at her option might draw according to the estimated amount which probably would go to her credit for her share of the profits for the year. The partnership not proving successful, it was dissolved by mutual consent, at the end of two years—that is, in March, 1873—Hutchinson retiring. From that time the business was continued by Smith and Mrs. Green (they took the assets and assumed the payment of the debts), under the firm of R. F. Smith & Co., for about a year, when it was found necessary, by reason of the want of success, to

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close it up. All the capital was gone. By agreement dated in June, 1874, between them and the administrator, they transferred all the assets to him in consideration of his assumption of all the debts and liabilities of the concern. The administrator converted the assets thus acquired by him into money, and after paying all the other debts of the concern (which were not large comparatively), realized on account of his claim \$1,854.10. A few of the notes given to the administrator by Hutchinson & Smith for purchase-money were paid. The amount so paid was \$6,339.01. The rest are unpaid. They amount, not including interest from their maturity, to \$13,202.74. It appears, then, that the administrator received for the stock and fixtures sold to Hutchinson & Smith about \$18,000, including some interest on those of the notes given on account of purchase-money which were paid. The administrator claims allowance for the loss, on the ground that his conduct in the transaction was fair and honest. It is also urged in his behalf that he was unwilling to accept the office of administrator, and only did so at the urgent request of Mrs. Green; that he was induced, by representations made by her and a gentleman (Mr. William J. Best, afterwards the guardian of the children), to make the sale to the firm of Hutchinson & Smith, and that he only consented because it was a family arrangement which he was unwilling to oppose, having for its object the sale of the stock and fixtures at a better price than could otherwise have been obtained; the retention of the business (which was supposed to be valuable) for the boys and the relief of the estate from the large rent for which it was liable under the lease. That the administrator consented to the arrangement for the sale of the stock and fixtures to Hutchinson & Smith, only because it was believed that thereby a greater price might be obtained for them than otherwise could be got, and that thereby the family would be benefited, there is no reason to doubt. The widow contributed all the capital to the firm, and it was not contemplated in the arrangement that either Hutchinson or Smith should contribute any. Neither of them appears to have had any to contribute. The fact that she contributed the \$15,000 was the inducement to Hutchinson and Smith to enter

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into the arrangement with her. It was supposed by her and her friend and adviser, Mr. Best, and by the administrator also, that by means of the firm and her contributing the \$15,000, of which \$10,000 were to go on account of the purchase-money of the stock and fixtures, and \$5,000 for working capital, advantageous pecuniary results for the estate would be produced, not only in the price to be obtained for the stock, much of which was the residuum of a business of many years standing, and could be sold at retail with other and newer purchases to far better advantage than it could be disposed of at auction, but also in the price to be obtained for the fixtures, and in saving the estate from a heavy loss on the lease. The appraisement was in fact made by Smith (the administrator taking no part in it), and was not made with reference to the price which the property would probably bring at auction or forced sale. Mr. Scheitlin, who was a creditor of the estate to a very large amount, testifies that, in his judgment (and he seems to be able to give a reliable judgment on the subject), if the stock and fixtures and lease had been sold at auction, the result would have been, taking into account the loss which would probably have been met on the lease, that the estate would not have realized over \$11,000 from them. He estimates the loss on the lease at \$9,000, and is of opinion that the stock and fixtures would not have brought over \$20,000, or fifty cents on the dollar of the appraisement. In considering the question of the liability of the administrator, who has acted in good faith in the whole matter, it would obviously be unjust not to take into account the character of the whole transaction, and judge him accordingly. He was, of course, on his final accounting, permitted to show that the appraisement was too high, and he did so. When it is urged that he in fact sold the property at the appraisement, and therefore is to be bound by it, the character and circumstances of the sale are to be taken into account. The sale was in fact to the widow; for, as before mentioned, it was her money with which the \$10,000 of cash were paid on account of the purchase-money, and her money alone which constituted the capital of the concern, all of which, by the way,

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was lost. She thus undertook to carry on the business in order to make a good market for the stock and fixtures for the benefit of the estate, and the copartnership was the means adopted to accomplish the purpose. The creditors are all paid in full. Evidently the widow has no ground of claim against the administrator. Were the claim made by the exceptants allowed, and the administrator thereby compelled to answer out of his own estate for the large deficiency claimed against him, equity would not permit her to take any part thereof under the circumstances. So far as the children are concerned, the question is whether the administrator should be held to account on the ground of the assumption that the sale to the firm of Hutchinson & Smith was, as against him, a test of the true value of the stock and fixtures, and therefore of the amount with which he is chargeable in respect thereof, and that the notes taken by him for purchase-money are to be regarded as notes made by a stranger for purchase-money in an ordinary sale would be; or whether the firms of Hutchinson & Smith and R. F. Smith & Co. are to be regarded as having, in a certain substantial sense, acted as agents of the estate in disposing of the stock and fixtures, and securing it against loss from the lease. The orphans court took the latter view, looking upon the matter as a family arrangement, and it is not only according to the justice of the case, but, in my judgment, clearly right, in every point of view. That the result has been more advantageous to the estate than a sale of the stock and fixtures and lease at public sale would have proved, I see no reason to doubt, and I see no just ground for surcharging the account. The decree of the court below will be affirmed, but without costs.

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CHARLES F. LUDLOW et al., appellants,

v.

JAMES C. LUDLOW et al., respondents.

A decedent went into a store to execute his will. His brother James was there, and also Mr. Harrison and Mr. Miller. James said to Harrison, in the hearing of the decedent, "My brother has been making his will, and I would like to have you witness it," to which Harrison replied, "All right." The decedent, James and Harrison, then went into a small enclosure or desk, with glass around the top, so that persons inside of it were visible to others in the store. James said to Harrison, "This is my brother's will, I would like to have you witness it," whereupon decedent signed it, and Harrison, who saw him sign it, also signed as a witness. James then stepped out of the enclosure, and going to Miller, who was engaged at a counter about ten feet away, said, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, now I want you to," and then Miller went into the enclosure where decedent remained (Harrison having stepped out to make room for Miller), and signed his name to the will as a witness. Before James asked Miller to sign, the latter did not know that decedent was signing his will, although he surmised so because James had told him, a few weeks before, that his brother was coming there to execute his will, and that he (James) would like him (Miller) and Harrison to witness it. Miller testified that he thinks decedent heard James request him to witness the will. Miller did not see decedent sign nor hear him acknowledge his signature to the will.—*Held*, that there was no publication of the will by decedent in Miller's presence, and therefore that there was no execution of it, in compliance with the statute.

Appeal from decree of Essex orphans court.

Mr. J. W. Taylor, for appellants.

Mr. T. N. McCarter, for respondents.

THE ORDINARY.

This is an appeal from a decree of the orphans court of Essex county, admitting to probate a paper writing, purporting to be the last will and testament of William A. Ludlow, deceased.

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The controversy between the parties is as to the legality of the execution of the instrument. The will was signed on the 28th of October, 1879 (though it is dated November 28th), at a store in the city of Newark, to which the testator had come for the purpose. The witnesses whose names are signed to it, are James E. Harrison and Wesley C. Miller. The testator's brother, James C. Ludlow, was in the store (which was Mr. Harrison's) when the testator entered. When the testator came in, Mr. James C. Ludlow said to Mr. Harrison, "My brother has been making his will, and I would like to have you witness it," to which Mr. Harrison replied, "All right;" and they three then went into an enclosure—a desk—on one side of the store. This enclosure was not so high but that persons outside of it in the store could see men standing within it. The upper part of it, above the desk, was of glass. After the three went inside, Mr. James C. Ludlow said, addressing Mr. Harrison, "This is my

NOTE.—By statute, a publication is necessary in the states of New York, New Jersey, Louisiana, North Carolina and Arkansas, *1 Jarm. on Wills* (5th Am. ed.) 207, note; also in Vermont, *Roberts v. Welch*, 46 Vt. 164; California, *Johnson v. Rice* (1881), 11 Rep. 664; and Missouri, *Odenwaelder v. Schorr*, 8 Mo. App. 458.

In Maine, Massachusetts, Kentucky, Illinois, Indiana, South Carolina and Virginia, mere execution of a will, with knowledge of its contents and attestation, is sufficient, *1 Jarm. on Wills* (5th Am. ed.) 209, note; *Turner v. Cook*, 36 Ind. 129; *Black v. Ellis*, 3 Hill (S. C.) 68; and also in Iowa, *Hulse's Will*, 52 Iowa 662; Minnesota, *Allen's Will*, 25 Minn. 39; Connecticut, *Canada's Appeal*, 47 Conn. 450; and Mississippi, *Watson v. Pipes*, 32 Miss. 451.

Query. As to Michigan, *McGinnis v. Kempsey*, 27 Mich. 363; Wisconsin, *Downie's Will*, 42 Wis. 66; and Pennsylvania, *Mealey's Estate*, 11 Phila. 161; and England, *Ross v. Ewer*, 3 Atk. 156; *Moodie v. Reid*, 7 Taunt. 361; *Spilsbury v. Burdett*, 4 Ad. & El. 14, 10 Cl. & Fin. 340; *Vincent v. Bishop*, 3 E. L. & Eq. 198; *Bond v. Seawell*, 3 Burr. 1775; *Trimmer v. Jackson*, 4 Burn's Ec. Law 102; *Johnson v. Johnson*, 1 Cr. & Mee. 140; and Austria, 22 Alb. L. J. 324.

In the following cases the attestation has been deemed sufficient:

In *Wright v. Wright*, 7 Bing. 457, one witness was called in by testator, who explained to the witness that the paper which witness attested was his will; afterwards, when the first witness was not present, two other witnesses subscribed their names to the will, but neither of them was informed that he was witnessing a will, nor did either of them see testator's signature thereto.

In *Inglesant v. Inglesant*, L. R. (3 P. & D.) 172, the decedent signed her

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brother's will, I would like to have you witness it," and thereupon the testator signed the paper, and Mr. Harrison, who saw him sign it, also signed it as a witness. Mr. James C. Ludlow then stepped out of the enclosure and went to Mr. Miller, who stood at a counter, at the distance of about ten feet from where the testator was standing. Mr. Miller says that at the time he was engaged in handling goods at the counter, or in some such business, Mr. James C. Ludlow, addressing him, said, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, now I want you to," and thereupon Mr. Miller went into the enclosure, where the testator was (Mr. Harrison had stepped out to make room for Mr. Miller), and signed his name to the will as a witness. Before he was asked to witness the will he did not know that the testator was signing his will. He says he had an impression that that was what the parties were doing there, because some time—from two to four weeks—

will in the presence of one witness. On the entry of the second witness, a person present audibly directed him to sign his name under that of decedent, which he did, and the other witness then signed. The decedent said nothing. The will was lying open, and headed in large letters, "This is the last will and testament of" &c. It also had a full attestation clause.

In *Gilman v. Gilman*, 1 Redf. 354, 38 Barb. 364, the desk whereat the testator and one of the subscribing witnesses sat when the testator signed his will and the witness attested, was separated from the desks where the two other witnesses sat, by a brick wall or column four feet broad, but it did not appear that their positions rendered their seeing the testator impossible. They were requested to witness the will by the first-named witness, thus: "Mr. Gilman [the testator] requests you to witness his will," in the presence and hearing of the testator, and they witnessed it without any request or declaration by the testator.

In *Stewart's Will*, 2 Redf. 77, the testator had declared to the draughtsman that he had selected the persons, who, in fact, afterwards became the witnesses, for that purpose, and had requested them to be sent for; and after he had subscribed they were directed [by whom, does not appear] to sign, the testator meanwhile moving away from the table where he had signed while they were looking on.

In *Forman's Case*, 1 Tuck. 205, 54 Barb. 274, one attesting witness testified that the testatrix told her in the room where the will was executed, before signature, that it was her will; the other testified that while testatrix did not tell her so in that room, she told her, when she went to the kitchen of the house to call her, that she wanted her to witness her will.

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before that Mr. James C. Ludlow had told him that the testator was coming there to sign his will, and that he, Mr. James C. Ludlow, would like to have him and Mr. Harrison witness it. Mr. Miller did not see the testator sign the will, nor did the testator verbally acknowledge his signature in his hearing. Mr. Miller testifies as follows :

“ Q. What were you doing when William A. Ludlow (the testator) came in that morning? A. I don't know; handling some cloth or goods or something like that. Q. Attending to your business, whatever it was? A. Yes, sir. Q. But you did not know when Mr. Harrison was called away and went in that room (the enclosure), that they were executing a will, did you? A. No, sir; I did not know it. Q. And will you please to state whether you were attending to your business, or whether you stopped and looked around and gazed at them, to see what they were doing? A. I may have glanced there. Q. Did you look with any knowledge of what was going on? A. I don't know as I did, sir. Q. Did you know what was going on? A. I did not know. Q. You did not see Mr. Harrison sign? A. No, sir. Q. You did

In *Morris v. Porter*, 52 How. Pr. 1, M., when about to execute her will, sent for B. to be a witness thereto; when B. came the will was lying on a table in front of M., and B. was asked by P., who had drawn the will, to sign it as a witness, such request being made in M.'s hearing. B. then signed the will as a witness, in the presence of M., who said, “thank you.” B. testified that he did not see M. sign the will, nor could he say whether or not her signature had been made thereto, when he signed it. P., however, testified that M. signed in the presence of all the witnesses.

In *Thompson v. Stevens*, 62 N. Y. 634, the testatrix went out and brought in a person whom she had requested to act as a witness; the will was then read aloud by the draughtsman, in this witness's presence. They all then went into another room where the other witness was, and he read the will aloud; the testatrix then signed it, and handed it to the draughtsman, with a request that he should witness it, and she also said, in the hearing and presence of all, that the one she had brought in would be a witness to it, and requested him to sign it, which he did. The other witness was told in her presence that he was needed to sign as a witness, and he then signed.

In *Dack v. Duck*, 19 Hun 630, 84 N. Y. 663, the testator signed a codicil in the presence of the draughtsman, before the other two witnesses, who were in an adjoining room, were called, and they were called by the draughtsman in a tone loud enough for the testator to hear, “to witness a paper.” After they came in, the draughtsman asked the testator if that was his signature, and he said that it was; then the draughtsman asked him if he wanted the witness to sign the will, and he said, Yes,—whereupon this witness signed, and also the other one.

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not see the testator sign? A. No, sir. Q. And he did not say anything to you? A. No, sir. Q. He did not say it was his last will? A. No, sir. Q. He did not request you to sign it? A. No, sir. Q. Did anybody request you to sign it as a witness in his presence? A. Mr. James did. Q. Where was he when he requested you to sign it? A. About five or six feet off. Q. He came to where you were? A. Yes, sir. Q. And stayed where you were while you went in? A. I think Mr. James came along with me, or came near the door (of the enclosure). Q. Did he say anything when you got within hearing of Mr. William? A. No, sir. Q. Did he say anything to you that was audible to Mr. William A. Ludlow? A. He did not say anything to me, only that which he said outside about the will."

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He also says that he should think that what Mr. James C. Ludlow said to him could have been heard by the testator, and that he thinks it was heard by him. He further says that the testator did not acknowledge the paper to be his will. Also, that the witness heard nothing that was said while Mr. Harrison was inside the enclosure, and did not see the latter sign, nor did

In *Odell v. Lidlum*, 3 Redf. 181, note, the servant of the testator summoned one of the witnesses as such; both witnesses were in testator's presence when he gave instructions for and signed the will, and they signed in his presence, the one summoned by the servant at the request of the notary who drew the will, the other at testator's request.

In *Smith v. Smith*, 2 Lans. 266, the testatrix signed the will in the presence of the witnesses and the draughtsman, and acknowledged it to be her last will. The draughtsman then said to one of the witnesses, "Now, Mr. White," handing him the pen. Mr. White signed his own name, and then handed the pen to the other witness, who also signed. Also *Moore v. Moore*, 2 Bradf. 261; *Belting v. Leichardt*, 2 T. & C. 52.

In *Bundy v. McKnight*, 48 Ind. 502, a request made by the scrivener who drew the will, that the witnesses should attest it, in the presence and hearing of the testator, and without objection by him, was followed by actual attestation in his presence. Also, *Etchison v. Etchison*, 53 Md. 348.

In *Huff v. Huff*, 41 Ga. 696, testator came to the warehouse of B. and asked him to be a witness to his will; he brought S. with him as another witness, and they all waited some time for G., but as he did not come and A. stepped into the room, B. said to testator that A. would answer the purpose as well as G. Testator said he was not acquainted with A., and B. said he would introduce him. B. called up A. and introduced him to testator, remarking to A. that testator wanted him to witness his will, whereupon they all stepped to a desk, and the testator signed it and then the three witnesses.

In *Meurer's Case*, 44 Wis. 392, the witnesses went to testator's house for the express purpose of witnessing his will, which testator then knew; they also

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he hear the testator say the paper was his will. Obviously, the testator no more signed the will in his presence than in the presence of any other person in the store, who may, at the time, have happened to be within the same distance from the testator, or even further off, and who was engaged in his own business and was not aware of the presence of the testator. The intention of the statute is that the testamentary act shall itself be witnessed. The signing may be acknowledged by the testator, but the signature must either be made or acknowledged by him in the presence of the witnesses; and his saying that the paper is his will is not an acknowledgment of his signature, within the meaning of the statute. The English statute (*1 Vict. c. 26 § 9*) provides that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and that such witnesses shall attest and shall subscribe the will in the presence of the testator. In *Ilott v. Genge*,

knew that B., who drew the will, was there for that purpose, and saw him at work on it, and B. requested them to come into the room where testator lay, for the purpose of witnessing his will, which they did, and remained there while B. read the will aloud and testator signed it; they then signed, in testator's presence, without objection on his part, he knowing that they were signing as witnesses to his will.

In *Allison v. Allison*, 46 Ill. 61, the ordinary attestation clause to a will was read aloud, after the testator had signed, in the presence of the testator and the witnesses to whom the testator handed a pen, and they then signed, although the testator uttered no word while they were present.

In *Cheatham v. Hatcher*, 30 Gratt. 56, a testatrix, Mrs. H., executed her will in the presence of G. and C., and G. said to her, "Do you wish me to sign it as a witness," she said she did, and he then subscribed his name in her presence. It was supposed by all of them that only one witness was necessary, and consequently C. went away from the house. After he was gone, a messenger from one L. informed them that two witnesses must attest the will, and the matter was openly talked about while a messenger had been sent after C. When C. returned to the room, G. told him aloud that it was necessary for him to sign the will, saying to him, "You were present, and saw Mrs. H. sign it, and heard her acknowledgment when I signed it," and he said, yes, he was. C. was then told that it was necessary to sign in the presence of Mrs. H., and C. subscribed it, within a few feet and directly in front of Mrs. H. There was a difference of opinion between G. and C., as shown by their testimony, as to Mrs. H.'s consciousness when C. signed.

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3 *Curt.* 160, where probate of the paper propounded was denied, Sir H. J. Fust indeed said, in delivering judgment, that the construction he would be inclined to put on that clause of the statute was, that the production of the will with the signature to it, and requesting the witnesses to attest, and their attesting and subscribing the will, would be sufficient; but on the appeal to the privy council, the judicial committee, consisting of the Lord Chancellor, Lord Brougham, Lord Campbell, Vice-Chancellor Bruce and Sir S. Lushington, were unanimously of opinion that the mere circumstance of calling in witnesses to sign does not amount to an acknowledgment of the signature. *Ilott v. Genge*, 8 *Jur.* 323. And so, too, it has been held, notwithstanding the fact that the testator speaks of the instrument to the witnesses at the time as his will. *Hudson v. Parker*, 8 *Jur.* 786; *Shaw v. Neville*, 1 *Jur.* (N. S.) 408. Our statute provides that the will "shall be signed by the testator, which signature shall be

In the following cases, the attestation has been deemed insufficient:

In *Pearson v. Pearson*, *L. R.* (2 *P. & D.*) 451, the decedent called A., who was an illiterate man, into his room and asked him to make his mark to a paper, which he did. A., at the decedent's request, then fetched his wife, who was living in the house, and she also, at decedent's request, placed her mark on the same paper. There was no evidence that the signature of the decedent was on the will at the time these marks were made, nor did the decedent, in any way, explain to the witnesses the nature of the document they signed.

In *Griffith v. Griffith*, 5 *B. Mon.* 511, when a testator, who was lying in bed, was informed that a witness to his will, K., had arrived, he told G., the draughtsman, to go on with the business, and then signed the will; G. also signed it as a witness. When K. went into the room, G. told him that the paper was the will of C. (the testator), and he wished him to witness it, and thereupon he put his name to the paper. K. did not know that testator was in the room, until shortly afterwards he saw him rise from the bed and go into an adjoining room.

In *Tucker v. Oxner*, 12 *Rich.* 141, the will was drawn by testatrix's son J., who requested G. to go into his mother's house to attest her will. There were two rooms in the house, a large and a small one; testatrix was in the large room, through which witness passed; the rooms were divided by a partition with a door in it; he passed into the small room with J.; the will was on a table, and G. sat down and signed his name between the signatures of the other two witnesses; after doing so he rose up, and, as he turned around, he saw testatrix leaning against the door-post of the partition door, where she

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made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses in the presence of the testator." *Rev. p. 1247*. It will be seen that it not only requires that the signature be made or acknowledged in the presence of the witnesses, but that the testator declare the paper to be his last will in their presence. The English statute does not require the latter. In *In re McElwaine*, 3 C. E. Gr. 499, this court, speaking of the requirements of our statute, said: "Four things are required, first, that the will shall be in writing; secondly, that it shall be signed by the testator; thirdly, that such signature shall be made by the testator, or the making thereof acknowledged by him in the presence of two witnesses; fourthly, that it shall be declared to be his last will and testament in the

could have seen him signing; she did not speak to him at all, nor did she ever afterwards speak to him of her will.

In *Baker v. Woodbridge*, 66 Barb. 261, the subscription by testatrix was not made in the presence of either of the witnesses; nor was it acknowledged by her to either of them, and to one of them there was no declaration by her or by any one in her presence that the instrument was her will.

In *Harris's Will*, 1 Tuck. 293, decedent signed his will, while alone, and then called in the witnesses, one after the other, from an adjoining room, and said to each one, "Witness that," pointing to the will lying on his desk. See *Logue v. Stanton*, 5 Sneed 97; *Randebaugh v. Shelley*, 6 Ohio St. 307; *Haynes v. Haynes*, 33 Ohio St. 598; *Hoffman v. Hoffman*, 26 Ala. 535.

In *Kingsley v. Blanchard*, 66 Barb. 317, one witness testified that there was nothing said or done by which she knew that the testatrix desired her to sign as a witness. The other witness testified that one B., who was in the room and near the bed where testatrix lay, asked testatrix, after she had signed the will, if this was her last will and testament, and if she wished those witnesses to sign it or to witness it; that testatrix replied, she did not know as she could say that it was her last will; that B. then said, "The last one you have made now," and she replied, "Yes, the last one I have made now." See *Alexander v. Beadle*, 7 Coldw. 126, 9 Baxter 604; *Wooster v. Wooster*, 4 Rich. 409; *Hitch v. Wells*, 10 Beav. 84.

In *Bagley v. Blackman*, 2 Lans. 41, a witness was notified, when sent for, that he was needed to attest a will, and went to testator's house for that purpose. When he went into the room, decedent requested one S. to bring "that paper" from a trunk in the room, which S. did, and also asked S. where the

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presence of those witnesses. Each and every one of these requisites must exist. They are not in the alternative. The third requisite contains an alternative, but one of those alternatives must exist. The second requisite—the signing by the testator—must exist. The second alternative of the third, to wit, that he acknowledge the making of the signature, will not supply the want of the second.”

In that case the testatrix did not, from feebleness, sign her name, but, at her request, another person signed it for her, and though the point of the case was that the signature was not made by her, the case is important as showing the care which has been taken in construing the statute not to depart from the plain requirements of its language. In the case in hand there was no declaration to Mr. Miller that the paper was the testa-

pen and ink were, which S. brought and laid them all on a table. Decedent then sat down and signed the paper, and asked the witness if he would witness that paper, which he did. Decedent then asked where was N. (the other witness), who had stepped out. When N. came in, decedent said something to him about signing it, which N. did.

In *Neugent v. Neugent*, 2 Redf. 369, the scrivener read over the will to the testatrix, who said it was all right, and that the scrivener should sign it for her (on account of her physical weakness). Testatrix said nothing to the scrivener about his attesting it, but somebody in her presence requested that he should be a witness, and thereupon he signed as such. The scrivener afterwards asked C., the other witness, to sign also, which C. did. C. testified that he did not hear testatrix say anything when she signed, or when he signed.

In *Stein v. Wilzniski*, 4 Redf. 441, the testatrix was a German and understood English very imperfectly. One witness, M., read over the will, which was written in English, and rendered it into German for the testatrix by verbally giving her a synopsis of it; she then signed it, as did also M., and then M. asked testatrix in German (which the other witness, D., did not understand) if she wanted D. to witness it also, and she replied in the affirmative, whereupon M. asked D. in English to attest it, which D. thereupon did. See *Hess's Appeal*, 43 Pa. St. 73.

In *Heath v. Cole*, 15 Hun 100, it is said that although when a man is well and strong, a declaration made by a third person, in his presence, that an instrument is his will, and a request by such person to the witnesses to sign it, may be assumed to be the acts of the testator, yet where he is very feeble and able to speak but faintly, such assumption cannot be made, unless his adoption of the acts of such person be clearly proved.—R&P.

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tor's will, except the statement made to him by Mr. James C. Ludlow, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, and now I want you to." This may have been heard by the testator. Conceding that it was, and that it therefore may be regarded as having been said by him, it was only a declaration that the paper which Mr. Miller was about to witness (but which was not then before him, and was not pointed out or shown to him) was the testator's last will. It cannot be construed to be an acknowledgment of the signature on the paper. Mr. Miller cannot, of his own knowledge, say who wrote that signature, except as he may know the writing of the testator, and so be able to speak on the subject. But the testator did not tell him, nor did any one else in the testator's presence, that the signature to the will was written by the testator. Indeed he does not say that he saw the signature at all. He probably did so, however. He undoubtedly saw it when he signed his name. Had Mr. Miller been requested to be a witness before the signature was made, and had he stood by accordingly, where he could have seen if he had looked, it would have made no difference whether he in fact saw the signing or not. But when the will was signed he had not been asked to be a witness. It was only after the testator and Mr. Harrison had both signed that he was requested to be a witness. He was in fact called after the testator had signed in the presence of Mr. Harrison. Reference was made on the hearing to the construction put upon a statute like ours by the courts of New York, who hold that where a testator produces a paper to which he has personally affixed his signature, requests the witnesses to witness it, and declares it to be his last will and testament, that is all that the law requires, and is a substantial acknowledgment of his signature. *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125. It is enough to say at this time, in that connection, that while I heartily approve of the principle which underlies and produced that construction—the principle of recognizing a substantial compliance with the statute as sufficient—there is no proof here of any acknowledgment whatever, either by word or in fact. The testator did not

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make the request, either to Mr. Miller or Mr. Harrison, but his brother did it. His brother, in making the request, in fact spoke in the first person. He said "I want you" &c. The testator does not appear to have uttered a single word in the whole matter, either to Harrison or Miller, except as he said "Good morning" in return to the salutation of the former. No assistance is to be had in this case from the attestation clause. It is merely "in the presence of." And obviously the affidavit made by Mr. Harrison before the surrogate to the effect that Mr. Miller was present when the testator signed the will, is of no importance. I have no doubt that the testator signed the will in the presence of Mr. Harrison, and that the paper was intended by him for his will, and I am loth to defeat his intention, but the construction I deem it my duty to put upon the statute constrains me to refuse to admit the paper to probate. The decree of the orphans court, and the proceedings of the surrogate, so far as the admitting the will to probate is concerned, will be reversed, but as to the payment of costs and counsel fees, the decree appealed from will be affirmed. The costs of the appeal, with a counsel fee of \$100 to each side, will be paid out of the estate

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY

JUNE TERM, 1882.

ERWIN DAVIS, appellant,

v.

JENNIE M. FLAGG et al., respondents.

If the money secured by a mortgage is justly due, the motives of a person in acquiring an assignment of it, and in foreclosing it, and his refusal to assign it to a third party, the money due being tendered to him, lay no ground for the staying of such foreclosure suit.

On appeal from a decree based on the following opinion of Van Fleet, V. C.:

The evidence shows, beyond all doubt, that the mortgage in suit was purchased and suit brought thereon for some other purpose than collecting the money due on it. If this is not so,

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it is difficult to see why Mr. Davis cannot say at once, without direction or instruction from his counsel, whether or not he will receive the amount due and assign the mortgage. It is easy to see how Mr. Davis may use his suit to oppress the Flaggs, and aid Mr. Baldwin in his litigation with them.

Legal remedies must be used for honest purposes. They must be used to obtain justice, and not to do wrong. Mr. Davis has an unquestionable right to enforce the payment of the money due to him on his mortgage, and to that end may bring a suit to have the mortgaged premises condemned to sale, and sold, but he has no right to employ his remedy, nor to suffer it to be used in such manner as shall give somebody else an unfair and unjust advantage over his debtor.

The proofs leave no doubt on my mind that Mr. Davis is permitting his money and his right of action in this court to be used by Mr. Baldwin's New York counsel for some other purpose than simply collecting the money due on his mortgage. In other words, he is suffering his right of action to be prostituted. The court, perhaps, cannot compel Mr. Davis to assign his mortgage, but it may unquestionably, on being satisfied that he is using its process for inequitable ends, deny him the further use of its process.

If Mr. Davis can get, by simply transferring his right to the mortgage, without incurring any liability whatever, or undergoing any labor or trouble, except to write his name, every penny that the court could make for him by selling the defendant's property, what possible consideration of either strict legal right or justice can he urge in defence of his conduct in refusing to take his money on those terms, and demanding that it shall come to him either as an unconditional payment or a judicial sale?

Relief of the kind I propose to give has been twice extended by the courts of our sister states of Pennsylvania and New York to defendants similarly situated. *Lyon's Appeal*, 61 Pa. St. 15; *Foster v. Hughes*, 51 How. Pr. 20.

An order will be advised that if the complainant refuses to assign his mortgage to such person as the defendants may desig-

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nate, on tender of the full amount due to him, together with the draft of a proper assignment to be executed by him, his action shall be stayed. The tender must be made within ten days after the date of the order, to the complainant's solicitor, and must cover the whole sum due for principal and interest and taxed costs, including the costs of the dismissal of the present bill. The complainant has a right to be protected by a dismissal against liability for subsequent costs.

Mr. C. Parker, for appellant.

Mr. A. Q. Keasbey, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The facts to which the court in this case is to apply the law, are these :

Mrs. Flagg was the owner of certain premises, upon which she gave two certain mortgages of different dates, the first, in the order of priority, being executed in favor of the Mutual Life Insurance Company of New York, and the second to Abram H. Baldwin. This latter-named mortgagee filed a bill to foreclose his mortgage, and to that bill Mrs. Flagg, the mortgagor, put in an answer setting up a defence. It is alleged, and for present purposes it will be assumed, that it has been proved that Baldwin then procured the above-mentioned first mortgage to be assigned by the Mutual Life Insurance Company to one McCoon, and subsequently by him to Erwin Davis, the appellant in these proceedings. In this state of the facts Mr. Davis proceeded to foreclose this first mortgage, making Mrs. Flagg, and her husband, and Baldwin, the holder of the second mortgage, parties. It further appeared that after this first encumbrance had been assigned to McCoon, an offer was made, in the interest of Mrs. Flagg, to pay the money due on such mortgage, provided an assignment should be made to the third person so advancing the money. This requisition was not complied with, and there-

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upon the counsel of Mrs. Flagg obtained an order on Davis to show cause why his foreclosure suit should not be stayed. And testimony having been taken under that rule, and the foregoing facts having been substantially developed, an order was granted which was essentially to this effect: that if upon a tender made by the defendant Mrs. Flagg, or by any one in her behalf, of the full amount of the principal and interest due upon the mortgage held by Davis, together with his taxed costs, the said Davis should refuse to assign his bond and mortgage to such person or corporation as Mrs. Flagg might designate, all further proceedings in such foreclosure suit should be stayed, provided said tender be made within ten days from the date of said order, and that said Davis, on receiving the money and making the assignment, should enter an order dismissing his bill.

The order appealed from cannot stand. It proceeds upon the principle that although a second mortgagee has a right, as a general rule, to buy in a first mortgage and proceed to foreclose under it, yet if his motives are bad in acquiring such interest, equity will not permit him to prosecute such suit. This view, it seems to me, is founded on the fallacy that equity can base its action on a state of mind, irrespectively of the fact that the conduct induced by it is entirely lawful, and in a legal sense, equitable. The legal pursuit of one's right, no matter what may be the motive of the promoter of the action, cannot be deemed either illegal or inequitable. In the present case, whatever the purpose of this second mortgagee may have been, he did no illegal act; the purchase of the first mortgage was legal, and the prosecution founded on it was legal; and the consequence is, that his suit cannot be stayed unless the rule is to be sanctioned, that an assignee of a mortgage has no right to foreclose it, provided it be shown that in obtaining such encumbrance he was actuated by ill-will or other immoral feeling. The abstract precepts of the moral code, disconnected from property and the rights of persons, are neither enforced nor noticed by courts of law or by courts of equity. It is true that this second mortgagee, or, what is the same thing, the person who represented his interest in this affair, refused to accept the money due on the first encumbrance

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and assign such instrument to a third person. But, again, that refusal was neither illegal nor inequitable; so that we have but the option to set aside the order made in this case, or to sanction the rule that a legal and equitable right is not enforceable in a court of chancery, if the motive leading to the acquisition of such right has been immoral or otherwise censurable. But the adoption of such rule would be, as it would seem, quite at variance with some of the most primary principles of our system of jurisprudence.

As the foregoing view has been justified by a reference to the fundamental ground of the law, it does not seem to be at all necessary to fortify it by a reference to adjudged cases, but as some of the remarks of the court in *Morris v. Tuthill*, 72 N. Y. 575, a case contained in the brief of the counsel of the appellant, are so apt to the matter in hand, a quotation of some of them will not be out of place, as it will obviate the necessity of further discussion. The case referred to arose in a foreclosure suit, the answer setting up a conspiracy to prevent the defendants from raising the money to pay the two mortgages in suit; that to pay such mortgages it was necessary to raise a large part of the money on the credit of the premises, and that a savings bank had agreed to make the necessary advances on the security of these mortgages, and that the complainant had fraudulently promised an assignment of such security. In reference to these matters the court said: "The motives of the former owner of the mortgages in selling, or of the plaintiffs in buying them, are not material, and the appellant has no concern with the consideration of the assignment. It is sufficient that the mortgage debt is due, and is now owned by the plaintiff. He may have bought the mortgages from motives of malice toward the defendant and solely with a view to sue upon them, and the former owner from a like motive may have transferred them without consideration, but this would not constitute a defence to the action. The appellant can only arrest the action by paying the amount due, or tendering the same and bringing it into court. The facts stated do not constitute an equitable defence."

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This, it seems to me, is a correct statement of the law on this subject.

But it is claimed by the counsel of the respondent that the order in question is not an appealable decision. This position is not sustainable. The order is founded on a denial of the equitable right of the complainant to prosecute his suit, and imposes a condition upon him, and arrests his proceeding for an indefinite time. And this judicial action does not even purport to have been made as an exercise of discretion, but is an adjudication founded on the supposed equities of the case viewed in the light of established rules. Such a decision, according to a train of decisions in this court, is plainly the subject of an appeal.

The decree should be reversed.

Decree unanimously reversed.

JOHN P. WAKEMAN, appellant,

v.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD
COMPANY et al., respondents.

A wrong which is a mere technical invasion of complainant's rights, and does not threaten serious injury, will not lay a ground for a preliminary injunction.

On appeal from a decree of the chancellor, based on the following opinion of Van Fleet, V. C.:

What the complainant really asks in this case is a mandatory injunction.

He has framed his prayer so that if an injunction follows its language, it will be, in form, simply prohibitory, but its effect must be mandatory. It will, in effect, command an affirmative

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act to be done, viz., the removal of obstructions from alleged ways.

As a general rule a mandatory injunction will not be ordered except upon final hearing. This rule has a single exception. A mandatory injunction may be ordered on motion and before final hearing, to protect a person in the enjoyment of an easement, or a right of like nature. *Rogers Loco. and Machine Works v. Erie Railway Co.*, 5 C. E. Gr. 379. But to justify its issuance, even in such cases, the complainant's legal right must be clear and his injury recent. A complainant who asks for an injunction must always show that his right in the subject in dispute has been established by proceedings at law, or that it is free from serious doubt, according to settled legal or equitable principles. *Morris and Essex R. R. v. Pruden*, 5 C. E. Gr. 530; *Hackensack Insurance Co. v. N. J. Midland R. R. Co.*, 7 C. E. Gr. 94.

The complainant in this case grounds his right on an exception contained in a deed made by him to John A. Dix, bearing date March 9th, 1872.

I quote the material part of the exception: "The party of the first part expressly excepts and reserves to himself and Peter Sanford, their heirs and assigns, * * * the right of way to pass over the tracts hereby conveyed, to and from all portions of their respective tracts of land or wharves forever." The lands conveyed lie immediately adjacent to the main track of the Paterson, Newark and New York railroad, and near the passenger and freight depots of that road, in the city of Newark, and were purchased for railroad purposes, and have, since immediately after their purchase, been used as the road-bed for sidings, on which cars not in use have been stored. The defendants have provided the complainant with a convenient way across their tracks—no complaint is made against them on that account—but the complainant claims that by the true construction of the exception he is entitled to as many different ways as may be necessary to the profitable use of his lands.

If such was the meaning of the parties it is evident they have

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not expressed themselves with clearness. It seems to me that if there had been a mutual understanding of the character claimed, it would naturally have found expression in the use of words clearly indicating that the complainant should be entitled to several ways, as that he should have the right to pass over all parts of the land conveyed, or as many different ways over it as should be convenient or necessary to the profitable use of his land, or some other form of expression plainly indicating that he was not to be restricted to a single easement.

The complainant's construction is based, exclusively, on the words, "*to and from all portions of their respective tracts of land or wharves.*" But a single way will enable him to pass to and from all portions of his land. Such a construction would, I think, give full effect to every word of the exception.

But a more important fact remains to be considered: A strip twenty feet in width, of the lands conveyed, had, a year or more prior to the date of the deed, been condemned by the railroad company, and its main track was built thereon. Under its charter the railroad company is only obliged to construct a single crossing for each owner over lands condemned. Under such a state of facts, I think it may well be doubted whether, according to the established rules of interpretation, it was possible for the complainant to acquire, by a mere exception, or even a reservation, an additional way over the twenty-foot strip. A doubt on this point is fatal to the complainant's claim.

An injunction must be denied, costs to abide the event of the suit.

Mr. Joseph Coult, for appellant.

Mr. C. Parker, for respondents.

The opinion of the court was delivered by

BEASLEY, C. J.

The application for an interlocutory injunction was very properly rejected by the vice-chancellor in this case, for not the

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slightest ground for such an equity is laid in the bill. Its statements are substantially these: That the complainant was the owner of a tract of land situated in the city of Newark, extending from Passaic street to the Passaic river, and that in the year 1872 the Erie Railway Company desired to have a strip of this tract and of certain lands belonging to one Sandford, for the use of its railroad, and that the complainant conveyed such strip to a person acting in behalf of the said company, and which deed contained the following clause, to wit:

“But the party of the first part expressly excepts and reserves to himself and to Peter Sandford, their heirs and assigns, together with their servants, agents and other persons whom they may designate, the right of way to pass over the tracts hereby conveyed to and from all portions of their respective tracts of land or wharves forever, with horses, wagons and other vehicles.”

It is then alleged that the rights and obligations inherent in this conveyance have passed from the original grantee to the defendant.

The wrongful acts charged are in substance these: First, in the language of the bill:

“That the said lands, being near the Newark freight and passenger stations of the said company, are used, and since the construction of said tracks across it, have been used by the said company as a storage-yard for its freight cars which are not in use, and that so long as your orator has not needed, either for himself or his tenants, any right of way and passage over and across the said lands, he has allowed the said railroad company to store its cars on the said strip of land without complaint, but that he has never released or in any wise given up his right which he reserved in his deed.”

The second and remaining wrong complained of is, that the complainant, having rented a portion of the land which he alleges is entitled to the easement of right of passage over the railroad track, the defendant, on the application of such tenant, “refused to make a crossing at that point,” alleging that the complainant had a right only to one crossing, and that such crossing had been made for him.

Upon such a statement of facts as this, upon what imaginable principle is it that a court of equity can be called upon to inter-

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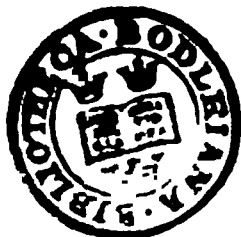
fere in a summary way at the threshold of the cause? With regard to the storage of the cars on this part of the railroad track, the complainant does not show that on any single occasion he or his tenants have suffered so much as an inconvenience. To what extent the cars have been stored is not disclosed, and although the complainant says that he himself allowed it to be done without complaint, he does not aver even that he has ever requested their removal. Even on the admission that the respondent's acts in this matter have been wrongful, it plainly does not follow that a preliminary injunction is to be issued. The wrong warranting such judicial action must be of a character which threatens to work an injury, which, in the view of equity, will be irreparable. It is the pressing necessity of the juncture which only will justify the use of what the books call the extraordinary power of the court. Construing the facts connected with this branch of the case most unfavorably to the respondent, they simply show that this company has technically invaded the rights of the complainant. This lays no ground for the application which was rejected by the vice-chancellor.

With regard to the other charge of wrong-doing, consisting of the allegation that the respondent refused to build or make a way over its track for the use of the tenant of the complainant, as such refusal was a mere nonfeasance, even if such conduct was unjustifiable in a legal sense, it cannot be reasonably claimed that it will serve as a foundation for the summary process in question. Obviously, the circumstances are not such as to make the use of a mandatory injunction proper. And independently of this preventive, there are other obstructions to the granting of the order in question, for it would be altogether extravagant to assert that it is clear that this covenant or reservation imposes on the original grantee of the complainant the obligation to build these ways over its road, and also that such obligation ran as a burthen with the land so as to be a charge on this respondent. The injunctive power cannot be called for in order to protect a doubtful right.

The decree should be affirmed.

Decree unanimously affirmed.

Wetherbee v. Baker.



AMOS WETHERBEE, appellant,

v.

EDWARD P. BAKER et al., respondents.

1. Subscriptions to capital stock are a trust fund for the payment of the debts of the corporation. The trust is created for the benefit of creditors as a class. All the creditors of the corporation have a common interest in this fund, and are entitled to share in it ratably.

2. A creditor, having exhausted his remedy against the corporation by judgment, execution and a return of *nulla bona*, may file a bill against stockholders to compel the payment of unpaid subscriptions to the capital stock.

3. The fifth section of the act concerning corporations (*Rev. p. 178*) provides that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company."

4. In a suit by a judgment creditor against stockholders of a corporation to compel payment of their unpaid subscriptions to the capital stock—*Held*,

(1) That such a suit can only be prosecuted by a creditor suing in behalf of all the creditors of the corporation.

(2) That the corporation is a necessary party to the suit.

(3) That all the property and assets of the corporation must be brought into the suit and put in the course of administration.

5. Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corporation, and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of acts or resolutions entered on its minutes, so as to raise up against them an equitable estoppel arising from a consent to the proceedings.

6. The capital stock subscribed is a substitute for the personal liability of partners in ordinary copartnerships, and creditors are entitled to a *bona fide* exercise of the compulsory powers of the corporation to compel subscribers to pay in their subscriptions.

7. The officers of a corporation are the trustees of the subscriptions to its stock, and hold them as a trust fund for creditors; and the trust cannot be defeated by any simulated payment of the stock subscriptions, or by any device short of actual payment in good faith.

8. Transactions under statutes authorizing corporations to purchase prop-

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erty and issue stock in payment for it, or to accept property in payment of subscriptions to the capital stock, are upheld only where the agreement to purchase property and pay for it in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation.

9. Courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors, only where payment has been made in money, or what may fairly be considered as money's worth.

10. The third section of the land improvement act (*Rev. p. 568*) enacts that payment of the capital stock of corporations organized under the act, shall be made either in money or in land—the land to be appraised by the board of directors and taken at such value.—*Held*,

(1) That this section does not supersede the obligation of subscribers to pay their subscriptions, as they appear in the certificate of organization—it simply provides the manner in which payment shall be made; and in a suit by creditors against a stockholder, to compel him to pay his subscription, the inquiry is, has he paid in money or money's worth?

(2) That the directors, in the appraisalment of land taken in payment of subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity.

11. Five persons agreed for the purchase of a tract of land, and organized themselves into a corporation, under the land improvement act. In the certificate of incorporation the capital was fixed at \$100,000, and these persons subscribed for all the capital stock, and became the directors of the company. The consideration of the purchase was \$50,000; the deed was made directly to the corporation, and it gave its obligations for the whole purchase-money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of fifty per cent. on the subscriptions to the capital stock. The lands were not worth more than the original purchase-money, and the company acquired no other property, real or personal. In a suit brought by a creditor of the corporation against the subscribers to the capital stock, to compel them to pay their subscriptions, in order to satisfy debts of the corporation—*Held*, that as against creditors of the corporation the allowance of a credit of fifty per cent. on the subscriptions of the stockholders was invalid, and that the stockholders were liable for the whole amount of their subscriptions to the capital stock, as they appeared in the certificate of organization.

On appeal from the decree of the chancellor, reported in *Wetherbee v. Baker*, 5 *Stew. Eq.* 537.

Mr. W. C. Spencer, for complainant.

Mr. J. H. Stone and *Mr. J. D. Bedle*, for defendants.

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The opinion of the court was delivered by

DEPUE, J.

The defendants, Edward P. Baker, Samuel Carpenter, George W. Barker, Charles F. Braune and George D. Howell, were subscribers to the stock of the Linden Land and Improvement Company, a corporation organized under "An act to encourage the improvement of real property in this state." *Rev. p. 567*. The certificate of organization is dated on the 20th of February, 1875. It was acknowledged by Baker, Carpenter and Braune on the 20th of February, 1875, by Howell on the 23d, by Barker on the 24th, and recorded in the clerk's office of the county of Union, February 24th, 1875.

In the certificate of incorporation the capital stock of the company was fixed at \$100,000, divided into shares of \$50 each, and each of the defendants subscribed for four hundred shares.

The company purchased of Wetherbee, the complainant, for the consideration of \$50,000, a tract of thirty-seven acres, which was conveyed to the company by Wetherbee by a deed bearing date on the 3d and acknowledged on the 5th of March, 1875. The premises were, at that time, subject to a mortgage given to Anna C. Stiles, for \$10,000. In the conveyance by Wetherbee to the company, the latter assumed the payment of the Stiles mortgage. For the balance of the consideration, \$40,000, the company gave three bonds—one for \$25,000, to Wetherbee, and two for \$10,000 and \$5,000, respectively, to Franklin Post. To secure Wetherbee's bond the company gave him a mortgage on the premises conveyed. It also gave two separate mortgages to Post, on the same premises, to secure the payment to him of his two bonds. The mortgages of Wetherbee and Post bear date on the same day, and were recorded at the same time, and it was provided that they should be concurrent liens.

By the company's by-laws the capital stock was payable, one-half on or before the 1st day of April, 1875, and the balance at the call of the directors. Nothing has been paid on account of the stock; but, by a resolution of the board of

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directors, adopted on the 25th of February, 1875, the said tract of land was taken and put in, at an appraised valuation of \$100,000, and \$50,000 was credited as a payment on account of the capital stock mentioned in the certificate of incorporation.

Nothing has been paid on account of the mortgage indebtedness. The Stiles mortgage was foreclosed, and a decree of foreclosure taken January 20th, 1877, on which a *fi. fa.* was issued, but no sale has hitherto been effected. Wetherbee sued on his bond and recovered a judgment against the company for \$28,245.72, on which execution was issued and returned *nulla bona*.

In this situation of affairs, Wetherbee filed his bill of complaint against the defendants as subscribers to the capital stock of the company. In his bill he prays that the defendants may be decreed to pay, on each share of the capital stock, the full amount of the par value thereof, to wit, the sum of \$50 per share for each and every share, and that out of the same his debt may be decreed to be paid and satisfied.

Answers were filed by three of the defendants—Carpenter, Braune and Barker.

On final hearing the chancellor made a decree in favor of the complainant, in accordance with the prayer of the bill, but allowed the land to stand as an equivalent for fifty per cent. of the capital stock, leaving only a balance of fifty per cent. due and unpaid on the defendants' subscription to the capital stock.

From this decree the complainant, and also Carpenter, Braune and the executors of Barker, have appealed.

The defendants contend that the complainant's suit is defective in the frame of the bill, and also on account of the absence of necessary parties. They insist that such a suit as the complainant is prosecuting can only be brought by a creditor suing in behalf of all the creditors of the corporation; that to such a suit the corporation is a necessary party, and that all the property of the corporation must, by the bill, be put in the course of administration.

The complainant's bill derives its support exclusively from the fifth section of the act concerning corporations. *Rev. p. 178.*

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Sections 93 and 94 of that act have no relevancy to such a suit. They were in the revision transferred to the general corporation act from the act for the establishment of companies for manufacturing and other purposes. *Nix. Dig. p. 538 §§ 31, 32.* These sections relate to cases where officers, directors or stockholders are made liable by the provisions of the act, specifically, for the payment of the debts of the company, or any part thereof, and provide in such cases for actions by any person to whom they are so liable. *Rev. p. 194. Waters v. Quimby, 3 Dutch. 296, 4 Id. 533,* is a precedent of a suit of this kind. Nowhere in the act does the non-payment of stock subscribed for make delinquent stockholders liable for the company's debts, except as is contained in the fifth section.

The fifth section provides that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company.

The word "capital," as used with respect to corporations, primarily signifies the aggregate of the sums subscribed for, and either paid in or agreed to be paid in by the stockholders. *Boone on Corp. § 105.* It is also in general use as signifying the sums paid in by the subscribers, with the addition of all gains or profits realized, with such diminutions as have resulted from losses incurred in transacting business. *Comstock, C. J., in People v. Comrs., 23 N. Y. 192, 219.* In this latter sense the capital of a corporation is the fund with which it transacts its business, and embraces all its property, real and personal, constituting the assets of the corporation, such as are subject to executions at law. *New Haven v. City Bank, 31 Conn. 106; Thomp. on Stockholders §§ 11, 12.* The words "capital stock," when aptly used, describe the interest of the stockholders in the corporation. Upon this distinction between the capital of a corporation, which is its property, and the capital stock, which represents the interest of stockholders in the cor-

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poration, and is their property, the power of the states to subject the shares of national banking associations to taxation, is vindicated. *Van Allen v. The Assessors*, 3 Wall. 573-584; *People v. Comans*, 4 Id. 244.

In the fifth section of the act concerning corporations the word "capital" is used in the twofold sense above indicated. It provides that when the capital paid in—meaning the capital paid in as increased by profits or diminished by losses, i. e., the property of the corporation—shall be insufficient to satisfy the claims of its creditors, and the whole capital—meaning the capital subscribed and agreed to be paid in—has not been paid in, then each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter, or such proportion of that sum as shall be necessary to satisfy the debts of the company. The stockholders are made liable for unpaid subscriptions, upon the call of creditors, only where the property of the corporation is insufficient for the payment of its debts. A creditor of the corporation cannot file a bill to call in moneys due from a stockholder on his stock, until he has exhausted his remedy against the corporation by judgment, execution, and return of *nulla bona*. *Thomp. on Stockholders* §§ 265-320. Each stockholder is made liable on his unpaid subscription only for the proportion thereof which may be necessary for the payment of the debts of the corporation, when the property of the corporation has proved insufficient for that purpose. Under these circumstances, the sum of the unpaid subscriptions to the capital stock is a trust fund for the payment of the debts of the corporation. *Sawyer v. Hoag*, 17 Wall. 610; *Sanger v. Upton*, 91 U.S. 56; *Wood v. Dummer*, 3 Mason 308; *Adler v. Milwaukee Brick Co.*, 13 Wis. 57; *Thomp. on Stockholders* § 10.

It is manifest from a consideration of the circumstances under which delinquent stockholders are liable to creditors for their unpaid subscriptions, and of the nature of the trust which is created, that, in any proceeding to enforce the liability of stockholders under this section, all the property and assets of the corporation must be taken into account, and that the proceeding

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must be for the benefit of all the creditors. The assets of the corporation and its total indebtedness must be brought into the account; for until they are ascertained, neither the amount of money required to satisfy the creditors of the corporation, nor the proportion of the sum required to be paid by each stockholder can be ascertained. The suit must be prosecuted for the benefit of all the creditors; for the trust is created for the benefit of the creditors as a class, and all are entitled to participate ratably in the common fund, and one creditor cannot, by superior diligence, either by a creditor's bill or by supplementary proceedings under the act concerning executions, obtain priority and appropriate to his own use a fund in which all the creditors have a common interest. *Pollard v. Bailey*, 20 Wall. 520; *Mann v. Pentz*, 3 N. Y. 415; *Morgan v. N. Y. & A. R. R. Co.*, 10 Paige 290; *Umsted v. Buskirk*, 17 Ohio St. 113; *Coleman v. White*, 14 Wis. 700; *Adler v. Milwaukee Brick Co.*, 13 Id. 57; *Thomp. on Stockholders* §§ 351–361. In such a suit the corporation is a necessary party, for without the presence of the corporation as a party to the suit no account of its property or of its debts can be taken. *Coleman v. White*, *Umsted v. Buskirk*, *supra*; *Thomp. on Stockholders* §§ 360–361.

The objection to the frame of the bill and for want of parties was not made in the answer, and seems not to have been taken in the court below. The litigation there appears to have been directed in the main to the defence, that the company was induced to make the purchase of complainant's lands by false and fraudulent representations, to which the complainant was privy. On the evidence, relief was properly denied on that ground. Indeed, the complainant's judgment against the corporation is record evidence of the validity of his claim against the corporation, which, in the absence of proof that the judgment was obtained by fraud or collusion with the officers of the company, is conclusive in a controversy such as this is, with stockholders. *Marsh v. Burroughs*, 1 Woods 463.

Courts of appeal entertain objections to the frame of a bill, or, on account of the omission of parties, with reluctance, where such objections have not been taken in the court below. The

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objection that this suit does not, on the face of the bill, purport to be prosecuted in behalf of the creditors of the corporation, might be disposed of by framing a decree in such a manner as to make all the creditors parties to it, so as to secure a ratable distribution of the property of the corporation, including the unpaid subscriptions to its capital stock, among all its creditors. *Marsh v. Burroughs*, 1 Woods 463, 467; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Morgan v. N. Y. & A. R. R. Co.*, 10 Paige 290; *Thomp. on Stockholders* § 357. The other objections are more formidable. The company is the owner of other property—the equity of redemption in the premises—and owes other debts. It assumed the payment of the Stiles mortgage, and thus became a debtor for the mortgage debt, and the two bonds it gave to Post are still outstanding. In these respects the objection to the frame of the bill is insuperable, and the corporation is indispensable as a party to a suit in which the amount of its property and the amount of its debts are involved.

For these reasons the decree should be reversed, and the record be remitted, to the end that the complainant's bill may be amended to accord with the views here expressed.

The evidence shows that Post was an active participant in the organization of the company, and that two bonds of the company, amounting to \$15,000, were given to him for his share of the consideration of the purchase from the complainant. He also, on the 24th of February, 1875—co-incident with the acknowledgment of the certificate of organization by Barker—executed a paper under seal, acknowledging that Barker signed the certificate for the purpose of filling out the requisite number of corporators, and agreeing to release him—Barker—from all pecuniary responsibility, and to save him harmless from all payments whatever. In the subsequent proceedings upon a bill amended as above indicated, these facts may be brought before the court by cross-bill or otherwise, and their effect upon the liability of the defendants, or of Barker, for the payment of the two bonds given to Post, may then be considered.

The complainant's appeal was taken on the ground that the

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chancellor allowed the defendants a credit of fifty per cent. on account of their subscriptions to the capital stock of the company. .

As already remarked, the defendants never paid anything on account of their subscriptions. The credit was allowed to them in the decree below by force of the resolution adopted by the board of directors on the 25th of February, 1875.

Section 3 of the land improvement act declares that the capital stock of any such company shall be paid in at such times, and in such manner and installments, as the directors may by their by-laws or otherwise direct, and such payment shall be made either in money or in land—the land to be appraised by the board of directors and taken at such value, on such terms as may be agreed upon. *Rev. p. 568.*

The resolution, which is given the effect of a payment of fifty per cent. on the capital stock, was adopted on the next day after the certificate of organization was recorded, and before the conveyance by Wetherbee was acknowledged and delivered. It recites that, whereas, Edward P. Baker, Samuel Carpenter, George W. Barker, Charles F. Braune and George D. Howell, are the equal undivided owners of the equity of a certain tract &c., recently owned by Amos Wetherbee, which they are desirous of conveying or having conveyed to the company as payment in part of their respective subscriptions to the capital stock, and the company is willing to accept the same, therefore it was resolved to appraise the same at \$100,000, subject to mortgages amounting to \$50,000, and to accept the balance of \$50,000 as payment of fifty per cent. of the capital stock subscribed; and the president and secretary were directed to execute and deliver the company's bonds and mortgages for the \$40,000 of the purchase-money, and its agreement to assume the Stites mortgage of \$10,000. The company never acquired any other property, real or personal, besides the land mentioned in the Wetherbee deed.

The complainant had no notice, actual or constructive, of the adoption of this resolution. Entries in the books of a corporation are, as a general rule, competent evidence of the pro-

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ceedings of the corporation, and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of the acts or resolutions entered upon its minutes. As to third persons, the books of a corporation are private books, and such persons are not chargeable with knowledge of matters there recorded, any more than a third person would be chargeable with knowledge of entries made against him in the books of a private person. 1 *Greenl. on Ev.* § 493; 1 *Whart. on Ex.* § 662; 2 *Taylor on Ev.* § 1581; *Haynes v. Brown*, 36 N. H. 545; *Marringe v. Lawrence*, 3 B. & Ald. 142. The minutes of the corporation were competent evidence of the fact that the board of directors adopted the resolution in question, but they cannot be made available to the defendants to charge the complainant with knowledge of this action of the directors, so as to raise up against him an equitable estoppel arising from his consent to their proceedings. The cases—and they are numerous—in which creditors have been allowed to enforce contributions from the holders of stock certified illegally to have been paid up when issued, are illustrations of this principle.

The resolution of the 25th of February can have the effect given to it only in case the credit on the defendant's subscription was made in compliance with the statute. The question is one of considerable importance, for if directors of a corporation can, by a simple resolution, write up a credit of fifty per cent. on the subscriptions to its stock, they may by the same facile method cancel the entire obligation of subscribers for its capital stock, and defeat the claims of creditors on that security.

The directors who adopted this resolution were the same individuals who were the subscribers to the capital stock of the company, and who were to receive the benefit of the credit proposed. They were the contracting parties on both sides. The resolution recited that they were the owners of the equity in the tract of land, which was untrue. They were neither the owners of any estate in the lands, nor did they in reality become purchasers of it. As promoters of the company, they occupied the position of agents of the company in acquiring the property on which the company was to be formed. The deed was made

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directly to the corporation, and the corporation gave its obligations for the whole purchase-money. The cost of the property was \$50,000, and it is apparent that was a full, if not an excessive, valuation. It was put in by the directors at a valuation of \$100,000. The property was over-valued, and the fifty per cent. credit on the subscriptions to the capital stock had nothing for its support but a paper resolution adopted by interested parties.

The first section of the act requires the certificate of organization to specify the amount of the capital stock, and the names and residences of the stockholders, and the number of shares held by each. This certificate is required to be acknowledged, and to be recorded in the county clerk's office, and then to be filed in the office of the secretary of state. The legislative purpose in exacting a statement of the amount of the capital stock, and of the names and residences of the subscribers, and of the amount subscribed by each, with the publicity of a public record of the certificate, was to provide a means of assuring the payment of debts contracted by the corporation. The legislature contemplated that subscriptions to the stock should be the capital with which corporations organized under the act should engage in business, on the credit of which the corporators were empowered to contract debts in the corporate name without any liability for such debts beyond the amount of their subscriptions to the stock. The capital stock subscribed is a substitute for the personal liability of partners in ordinary copartnerships, and creditors are entitled to a *bona fide* exercise of the compulsory powers of the corporation to compel subscribers to pay in their subscriptions. Any arrangement between the agents of the corporation and subscribers for its stock that their subscriptions shall be merely colorable, or less onerous than they purport to be on the face of the subscription, is void as a fraud upon creditors. *Thomp. on Stockholders* § 124. So rigidly is the obligation of subscribers to the capital stock enforced in favor of creditors, that it is no defence to such a subscription that the stockholder was induced to make his subscription by false and fraudulent representations of the corporation or its agents.

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Ogilvie v. Knox Ins. Co., 22 How. 380; *Upton v. Triblicock*, 91 U. S. 45; *Chubb v. Upton*, 95 Id. 665; *Oakes v. Turquand*, L. R. (2 H. L.) 325. The subscriptions to the capital stock constitute a trust fund for the payment of debts. The officers and managers of the corporation are trustees of the fund. They cannot squander it or dispose of it to the prejudice of creditors without an equivalent consideration, and the trust cannot be defeated by any simulated payment of the stock subscriptions, or by any device short of actual payment in good faith. *Sawyer v. Hoag*, 17 Wall. 610; *Boone on Corp.* § 112.

Nor does the fact that the third section of the act under which the company was organized, empowers the directors to accept either money or land in payment of subscriptions to stock, supersede the obligation of subscribers for its capital stock to make payment of their subscriptions. This section simply provides the manner in which payment shall be made.

The contract of subscribers to the capital stock of a corporation organized under this act is that contained in the certificate of organization on file. The certificate is made the official record of the amount of the capital stock of the company, and of the subscribers to it, and of the amount of the subscription of each. It is the charter under which the corporation is organized. The fifth section of the act concerning corporations gives creditors a right to call upon stockholders to pay such proportion of their unpaid subscriptions to the stock as shall be necessary to pay debts up to the par value of the shares as fixed by the charter. *Rev. p. 178*. The inquiry in any proceeding by creditors against stockholders under the latter section is, whether the subscriptions of stockholders have actually been paid.

The earlier cases held that the contract of the subscribers could only be fulfilled by payment in money. In later cases this doctrine has been relaxed, and stock issued and paid up in work and labor, or in the purchase of property the corporation is authorized to hold, has been held to have been legally issued. Statutes have also been passed authorizing corporations to purchase property needed for their business, and to issue stock in payment for it, or to accept such property in payment for sub-

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scriptions to the capital stock. But in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property, payable in stock, has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair bona fide valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money or in what may fairly be considered as money's worth. *Boynton v. Hatch*, 47 N. Y. 225; *Van Cott v. Van Brunt*, 82 Id. 535; *Talmadge v. Fishkill Ins. Co.*, 4 Barb. 382; *Carr v. Le Fevre*, 27 Pa. St. 413; *Drummond's Case*, L. R. (4 Ch. App.) 772; *Forbes and Judd's Case*, L. R. (5 Ch. App.) 270; *Spargo's Case*, L. R. (8 Ch. App.) 407; *Baron De Beville's Case*, L. R. (7 Eq. Cas.) 11, 14. Indeed, courts could not on any other doctrine administer the law of corporations, with the immunity of stockholders from responsibility for the debts of the corporation, and the substitution of stock subscriptions in the place of their personal liability, without opening the door for the grossest frauds upon creditors. In *Pell's Case*, L. R. (8 Eq.) 222, stock was issued to Pell for which he transferred to the company his interest in the good-will and stock-in-trade of a business carried on by him. The master of the rolls put his name on the list of contributors, and directed an inquiry as to the value of the property handed over by him, and ordered that he should be allowed such value and no more towards payment of his shares. This judgment was reversed by L. J. Gifford, sitting in the court of appeals, on the ground that the agreement to accept the property in payment of the stock had not been impeached by evidence or otherwise. L. R. (5 Ch. App.) 11. But the judgment of the master of the rolls was approved and the reversing judgment disapproved by L. J. James, in *Dent's Case*, L. R. (15 Eq.) 407, 411, and by the same eminent judge, with the concurrence of Lord Chancellor Selborne, in *Fothergill's Case*, L. R. (8 Ch. App.) 270, 278, 280; and Lord Selborne said that an act of parliament (30 and 31 Vict. c. 131) was passed to counteract and put a stop to

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the dangers and abuses incident to all such arrangements as those which led to that decision.

The third section of the land improvement act is legislation of the class above referred to. It authorizes the directors to accept land in lieu of money—as an equivalent for money—in payment of subscriptions to the capital stock. In an action by creditors against a stockholder in such a corporation, the proposition stands in this way: The stockholder is bound to pay his subscription as it appears in the certificate of organization—the act authorizes him to pay either in money or in land—and the inquiry is, has he paid in money or in money's worth? In responding to this inquiry we must bear in mind the purpose for which subscriptions for stock are created a trust fund—the payment of debts—and the persons in whose favor the trust is created—creditors of the corporation for whose benefit the directors of the company are to administer this trust. It is manifest that such an issue cannot be resolved in favor of the stockholder, unless he was the owner of the land he transferred to the company as payment; and the action is impeached and made invalid *pro tanto*, if it be shown that the property was taken at a price in excess of a fair valuation.

In neither respect can the resolution of the board of directors of February 25th, 1875, be sustained. The land which was accepted in payment of fifty per cent. of the subscriptions to the capital stock, did not belong to the defendants. They were agents in promoting the formation of the company, and effected the purchase for the company. The corporation paid the whole purchase-money by giving its obligations for it, and the property was not worth more than the sum for which these obligations were given. It is true that the statute directs the lands taken in payment of subscriptions to be appraised by the board of directors, and to be taken at their valuation by the company. But the directors, in making the appraisement and valuation and dealing with their stock subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. This appraisement, it is manifest, was illusory, and made only in the interest of the directors who were to profit by it. Under

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these circumstances the resolution in question was a nullity, and the defendants, so far as concerns the claims of creditors, have paid nothing on account of their subscriptions to the capital stock of the company, and are indebted for the full amount thereof, as the subscriptions thereto appear on the face of the certificate of organization.

The fifty per cent. credit was improperly allowed, and for this reason, also, we think the decree should be reversed.

Both parties succeeding on the appeal, no costs will be allowed to either in this court.

Decree unanimously reversed.

THE CITY OF ELIZABETH, appellant.

v.

CAROLINE C. SHIRLEY, respondent.

1. By a supplement to a city charter it was made the duty of the comptroller to give a certificate as to the liability of real estate for unpaid taxes or assessments, and it was declared that such certificate, in the hands of a *bona fide* purchaser or mortgagee, should relieve and discharge such real estate from any tax or assessment, except such as is therein stated to be unpaid. Two assessments had been laid on a certain lot owned by H.—one for the construction of a sewer, the other for paving the street. H. paid the paving assessment. The complainant, being about to purchase the lot, applied for and obtained a certificate of the comptroller under the act. The certificate set out the paving assessment, and stated that it was paid. The sewer assessment, which was unpaid, was omitted from the certificate. After the complainant took her deed, both assessments were set aside on *certioraris* presented by other parties, and H. sued and recovered back from the city the money he had paid in satisfying the paving assessment.—*Held*, that the complainant being a *bona fide* purchaser, the comptroller's certificate, by force of the supplement above referred to, concluded the city from making new assessments for the construction of the sewer or the paving.

2. *Kahl v. Love*, 8 Vr. 5, distinguished.

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On the 27th of April, 1874, the city of Elizabeth caused an assessment to be made for the cost and expenses of paving Jefferson avenue. This assessment was laid on a lot on Jefferson avenue owned by George R. Hill, in common with other lands fronting on the avenue. Hill's lot was assessed in the sum of \$1,211.76.

In June, 1874, a writ of *certiorari* was sued out by owners of other lands, which removed the assessment to the supreme court.

On the 14th of October, 1874, and during the pendency of the writ of *certiorari*, Hill paid the assessment laid on his lot.

On February 27th, 1875, judgment was rendered in the *certiorari* suit, setting aside the entire assessment.

In May, 1875, Hill sued the city to recover back the money paid by him to satisfy the assessment on his lot, and on the 11th of June, 1875, recovered a judgment, which the city paid on the 24th of December, 1875.

Another assessment was also laid on the same premises June 17th, 1874, for the cost and expenses of the Alina street sewer, amounting to \$485.24. This latter assessment was also set aside July 17th, 1875, on a *certiorari* prosecuted by owners of other property.

On the 17th of July, 1876, the city caused a new assessment to be made for the costs and expenses of the sewer, in which the sum of \$442.85 was assessed on the said lot.

On the 1st of August, 1876, a new assessment was also made and ratified for the cost and expenses of paving Jefferson avenue. In this assessment the sum of \$1,474.80 was assessed on the said lot.

In 1874 Caroline C. Shirley purchased the Jefferson avenue lot of Hill. His deed, which contained full covenants of warranty against encumbrances and for title, is dated September 15th, 1874, and was acknowledged October 15th, 1874. It was not delivered until the latter part of October, 1874, and was recorded January 22d, 1875.

Mrs. Shirley gave a mortgage on the premises to John H. Davis, dated January 2d, 1875. This mortgage was foreclosed,

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and the property bought by Davis. On the 3d of May, 1876, Davis reconveyed to Mrs. Shirley.

The city claims that the new assessments of July 17th, 1876, and August 1st, 1876, are liens on the premises in the ownership of Mrs. Shirley, and this bill was filed by Mrs. Shirley to have the lands declared free from such liens.

After a hearing before an advisory master, a decree was made in favor of the complainant, in accordance with the prayer of her bill. From this decree the city appealed.

On appeal from a decree of the chancellor, based on the following opinion of Barker Gummere, esq., advisory master :

1. I hold and determine that the case made by the pleadings in the cause arraigns the validity of the assessments upon the land of the complainant, against which she seeks relief by reason of matters not appearing on the face of the proceedings of the city authorities, and which must be demonstrated by extrinsic evidence ; and that this court has jurisdiction of the subject matter of the suit. *Liebstein v. Newark*, 9 C. E. Gr. 204 ; *Smith v. Newark*, 5 Stew. Eq. 4.

2. I hold and determine that the defendants, by failing to raise the question of jurisdiction by demurrer or plea, or in their answer, and having answered fully, and come to a hearing on the bill, have waived their right to object to the jurisdiction of the court. *Morris Canal and Banking Co. v. Jersey City*, 1 Beas. 259.

3. I find and determine that the certificates of Henry Aitken, comptroller, respectively dated October 12th, 1874, and October 22d, 1874, were made by him on the application of the complainant, and were authorized by section 1 of the supplement to the charter of the city of Elizabeth, approved March 5th, 1874, and were made in conformity thereto, and that there is no mistake therein in the name of the owner, or from a misdescription of the property, and that the complainant was, at the dates thereof, a *bona fide* purchaser of the premises concerning which such certificates were made ; that she contracted for the purchase

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of said lands in September, 1874, and that she completed said purchase, and paid over the purchase-money to her vendor on the faith of said certificates; that said certificates ratified and re-affirmed the former certificate of said comptroller, dated December 22d, 1873, and represented (and she was thereby induced to believe) said lands to be clear of any liens for taxes or assessments on the part of said city; and that the said certificates relieved and discharged the said lands from all liability on account of expenses incurred by said city for paving Jefferson avenue, and on account of expenses incurred by said city in the construction of a sewer in Alina street and other streets.

4. I find and determine that the re-assessment upon said lands made on August 1st, 1876, on account of the aforesaid expenses incurred by the said city in the paving of Jefferson avenue, is invalid; and that at the time of said re-assessment the said lands were relieved and discharged from all liability on account of said expenses, by force of the aforesaid certificates.

5. I find and determine that the said certificates enured, not only to the benefit of the complainant, who was a *bona fide* purchaser of said lands at the date thereof, but to all her subsequent *bona fide* grantees of said lands; and that whether the foreclosure proceedings instituted by John H. Davis and his purchase of said lands thereunder, were proceedings adverse to the complainant, and his subsequent conveyance to her was a resale of said lands, or whether such proceedings, sale and re-conveyance were friendly proceedings, and the complainant was in fact the equitable owner of said lands throughout, is immaterial, and that in either case the complainant holds the said lands, relieved and discharged from the assessments and re-assessments stated in her bill.

The complainant is entitled to the relief prayed in her bill and to a perpetual injunction.

Mr. Robert E. Chetwood, for appellant.

Mr. E. Q. Keasbey, for respondent.

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The opinion of the court was delivered by

DEPUE, J.

If the complainant's right to relief rested solely on the fact that these assessments were laid on her lands for an improvement made before she became owner, her bill would be without support. The common council has power to make a new assessment in case a former assessment is set aside by reason of informalities or irregularities. *P. L. of 1870 p. 758 § 13*. In *State, ex rel. Davis, v. Newark*, reported in connection with *State, ex rel. Doyle, v. Newark, 5 Vr. 236*, an assessment had been set aside on *certiorari*, and an act of the legislature was subsequently passed authorizing a new assessment for the same improvement. A re-assessment under the act was held valid as against the prosecutor, who had become owner of the lands in respect whereof he had been assessed, after the reversal of the former assessment.

Another ground for discharging the complainant's property from these re-assessments, somewhat pressed by counsel, is equally untenable. He contended that, without reference to the statute hereinafter referred to, the city was estopped from enforcing these re-assessments. His contention was, that the complainant having purchased the property relying on the comptroller's certificate that there was no unpaid assessment for the sewer, and that the assessment for the paving had been paid, on this fact alone the city was equitably estopped from making any assessments for these improvements. The conclusive answer to this argument is, that the officers of a municipality have no power to create estoppels which will bind the latter, unless authority to that effect is expressly granted by some statute. In *Kahl v. Love, 8 Vr. 5*, it was held that a purchaser who bought property relying on a tax collector's receipt as evidence that the taxes assessed on the premises had been paid, when in fact they were unpaid, acted at his peril, the collector being neither authorized nor required by any statute to give certificates that property was discharged from taxes. Such a certificate, if given with a fraudulent intent, may lay the foundation for an action against the officer for the deceit, but is in all respects destitute of force

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against the municipality, unless it derives a binding force from some statutory provision.

If the complainant is entitled to relief, she must obtain it in virtue of the supplement to the city charter passed March 5th, 1874.

The first section of the act is in these words :

"That it shall be the duty of the comptroller of said city, on the payment of the fees hereby authorized, to give to any person requiring the same a certificate as to the liability of any real estate in said city for unpaid taxes or assessments, as shown by any records in his possession or office ; and such certificate in the hands of a *bona fide* purchaser or mortgagee of such real estate shall, unless a mistake has occurred in the name of the owner, or from a misdescription of the property, relieve and discharge such real estate from any tax or assessment, except such as is therein stated to be unpaid, which certificate shall in all cases be signed by the comptroller, but may be made either by him or by any clerk in his office whom he may designate for that purpose ; provided, that such comptroller, when any such certificate shall actually be made out by him or such clerk, shall be responsible respectively to the city of Elizabeth for any loss occasioned by any erroneous certificate through the carelessness or negligence of such comptroller or clerk, but for no other cause." *P. L. of 1874 p. 242.*

The complainant began negotiations with Hill in September, 1874. They were conducted by her agent, Philip L. Wilson, a counselor-at-law, doing business in the city of New York, who was employed by her to examine the title. Hill brought to Wilson a certificate signed by the comptroller, dated December, 1873, certifying that there were no unpaid taxes or assessments on the premises. This certificate was not satisfactory, and Mr. Wilson took it to Elizabeth and left it in the comptroller's office, with a request that the comptroller should bring down the search to date. The paper was returned to him, and with it the following certificate :

"COMPTROLLER'S OFFICE, Elizabeth, N. J., Oct. 12, 1874.

"I, Henry Aitken, comptroller of the city of Elizabeth, do hereby certify that I have examined the records in my office in continuation of above search, and I do now find taxes and assessments unpaid as follows, viz.:

"No 6 for paving Jefferson avenue..... \$1,211 76

"Add interest from April 27, '74, to June 27, '74, at 7 %/o, and add

interest from June 27, 1874, at 10 %/o, 539, 13, Taxes of 1874..... 107 20

"Add interest from Oct. 20, 1874, at 24 %/o.

"HENRY AITKEN, *Comptroller.*"

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Wilson still refused to pass the title, and on the 22d of October, 1874, Hill produced an additional certificate annexed, as follows:

"October 22d, 1874. The above taxes and assessments have been paid since the search was made. HENRY AITKEN, *Comptroller*."

In fact, Hill had paid the assessments on the 14th of October. On the production of these certificates Wilson passed the title; the purchase was closed and the purchase-money paid.

No laches can be imputed to the complainant. She became the purchaser of the premises in good faith, relying on the comptroller's certificate. She did not lose her position as a *bona fide* purchaser by her mortgage to Davis, and the sale of the premises under the foreclosure. The foreclosure was made to clear up some intervening cloud on the title, and the premises were re-conveyed to the complainant by Davis, for a nominal consideration, before the new assessments were confirmed. Nor is the complainant debarred from relief by any want of good faith or diligence in endeavoring to protect her interests. Neither she nor her counsel had any knowledge that the first assessment for paving Jefferson avenue was set aside, or that Hill had sued to recover back the money paid on it, until after Hill had recovered his judgment and the city had paid it. The case turns entirely on the effect the legislature designed, by the act of 1874, to give to certificates of search made by the comptroller as a protection to purchasers and mortgagees of city property.

The act makes it the duty of the comptroller to give the certificate when required, and the body of the section, as well as the proviso, shows that the certificate, when given, was regarded as an official act which should bind the city. In this respect this case is distinguished from *Kahl v. Love*, 8 Vr. 5.

By the seventeenth section of the supplement to the city charter, passed April 2d, 1869, the legislature provided for official certificates with respect to the liability of real estate to assessments which were made available in the hands of *bona fide* purchasers and mortgagees. *P. L. of 1869 p. 1262*. This pro-

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vision was continued as section 23 in the supplement of April 4th, 1872 (*P. L. of 1872 p. 1202*), but was repealed by the eighteenth section of the supplement of April 4th, 1873, which not only repealed the section in express words, but also enacted that thereafter nothing should be held as discharging property from the lien of taxes and assessments but actual payment thereof. *P. L. of 1870 p. 787*. In 1874, the repealed section, with some unimportant alterations, was re-enacted and restored in the language above quoted. *P. L. of 1874 p. 242*. These changes in the legislation relative to assessments in the city of Elizabeth, indicate a deliberate purpose on the part of the legislature to provide, as far as practicable, a means of enabling purchasers and mortgagees to protect their estates from liability for taxes and assessments for prior improvements.

Assessments for benefits are required to be made by a board of commissioners, whose duty it is to make all assessments for damages and benefits. The comptroller is, *ex-officio*, secretary of the board. He is required to keep its minutes, and is the custodian of the maps and records pertaining to the work of the board, and must endorse every certificate of assessment returned by the board. A book called the "Record of Unpaid Assessments" is kept, in which is entered the names of the owners of the property, the description thereof, the amount of the assessment, the date thereof and when the same is payable, which book is to be properly indexed. *P. L. of 1869 p. 1261 §§ 14-16*; *P. L. of 1873 p. 778 §§ 2, 3, 4*. By the supplement of April 4th, 1872, the comptroller is charged with the performance of all the duties connected with the collection of assessments, except the receipt of the money therefor, which is to be paid to the treasurer. *P. L. of 1872 p. 1192 § 3*. With such a recording system, and schemes of public improvement prosecuted by the city on an extensive scale, it was eminently proper and judicious that a method should be provided which would, in some measure, enable owners of city property to sell or mortgage it upon a certification of the amount of assessments to which it would be subject.

The charter confers upon the city a general power of assess-

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ing property to pay the costs and expenses of public improvements, restrained only within the area and limit of actual benefits, and the city may practically choose its own time for making its assessments. The act of 1874 gives purchasers and mortgagees no protection against the general power of the city to make assessments, for until the assessment is in fact made, it cannot appear in the city records as an assessment paid or unpaid.

But when the assessment has been made, the situation is entirely changed. The power of the city to lay assessments has been exercised, and the proportion of the cost and expenses charged on each lot subject to assessment has been ascertained. The assessment, when made, is final and conclusive, and so long as it remains unreversed in due course of law, the lands are relieved from future assessments for the same improvement. A certificate of the comptroller, under the act of 1874, that the assessment has been made and has been paid, is in effect an official certificate that the share of the costs and expenses of the improvement assessable on the particular lot has been ascertained, and has been satisfied and discharged. The act declares that such certificate shall, as in favor of *bona fide* purchasers and mortgagees, operate to relieve and discharge such real estate from any tax or assessment, except such as is therein stated to be unpaid.

A construction which applies the certificate only to the state of the record as it was when the certificate was given, and allows a new assessment to be made which would become a lien in case the assessment certified to is reversed, would defeat the object which the act was intended to accomplish, and violate the spirit as well as the letter of the statute. The legislative purpose was to provide a certificate upon which purchasers and mortgagees might safely act. A purchaser or mortgagee who obtains a certificate that an assessment has been made and has been paid, or one which omits an assessment made and on record, invests his money on an official assurance that the property has been enhanced in value by the improvement, and at the same time is free from liability to assessment therefor. A subsequent assess-

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ment for such improvement, however brought about, would run counter to the assurance thus given. The injustice of allowing such an assessment to become a lien on the premises after a conveyance or mortgage, taken in reliance upon the certificate, cannot be better illustrated than by the facts of this case. The comptroller certified to the complainant the Jefferson avenue assessment as the only tax or assessment on the property, and that it had been paid. The complainant, on that certification, purchased the property, and paid, it is to be presumed, the full value of it; and if these two re-assessments are sustained as liens, her title, instead of being free from such encumbrances, will have become subject to the lien of assessments, amounting, with interest and costs, to over \$2,000. I cannot adopt a construction of the statute which would countenance such a measure of injustice, and destroy the value of certificates given under the act, especially where the act expressly declares that the certificate shall relieve the property from any tax or assessment, except such as is stated in the certificate to be unpaid.

The Alina street sewer assessment had been made, and was unreversed when the certificate was given. For the omission of that assessment, from the certificate, the city has a remedy against its delinquent officer, and it might have been protected against loss of the re-assessment for the paving of Jefferson avenue. The complainant's deed was on record. On an allegation that Hill had conveyed with covenants of warranty and against encumbrances, a court of equity would have restrained the recovery of the money paid in satisfaction of the first assessment, until the rights of all parties had been protected; and a court of law might have stayed execution of the judgment, or imposed terms that would be equitable.

No mistake had occurred in the name of the owner, or from a misdescription of the property, and the complainant is a *bona fide* purchaser. The complainant's case is within the provisions of the act, and we think she is entitled to have her property relieved from the lien of these re-assessments.

Much of the argument of the appellant's counsel was directed in denial of the jurisdiction of a court of equity to entertain

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this suit. The objection was not taken by demurrer or in the answer. The law has been settled in this court that chancery has no jurisdiction over assessments made in the course of municipal improvements, in the absence of specific equities. *Jersey City v. Lembeck*, 4 Stew. Eq. 255. The specific equity on which the complainant's suit is founded, is the equitable estoppel arising from the certificate; and estoppels *in pais* have always been recognized as a ground of equity jurisdiction, of which the equity court will not, in all cases, be deprived by reason of the estoppel being available at law as well as in equity. *The Society &c. v. L. V. R. R. Co.*, 5 Stew. Eq. 329.

The decree should be affirmed.

DIXON, J. (*dissenting*).

The statute relied on in this case requires the comptroller to give certificates as to the liability of any real estate in the city for *unpaid taxes and assessments, as shown by any records in his possession or office*; and provides that such certificates shall relieve and discharge the real estate from any tax or assessment, except such as is therein stated to be unpaid.

The clause in this act which provides for discharging the land, should be confined to such taxes and assessments as it is the duty of the comptroller to certify, *i. e.*, those unpaid, as shown in his office; and if he certifies the truth as to these, the statute does not design to change the position of either the city or the landowner with reference thereto.

As to the paving assessment, the truth was shown on the face of the certificate, and therefore as to this all the rights of the city should be preserved, and among them the right to levy a new assessment in case the old one had been set aside in judicial proceedings.

For this reason, the decree below, so far as it denies the right of the city to enforce the new assessment for paving, should be reversed.

For affirmance—DEPUE, PARKER, REED, SCUDDER, VAN SYOKEL, COLE, GREEN, KIRK, WHITAKER—9.

For reversal—DIXON, MAGIE—2.

Roe v. Moore.

WILLIAM T. ROE AND SUSAN ROE, appellants,

v.

CHARLES V. MOORE, respondent.

In order to set aside, as fraudulent against creditors, a conveyance to one creditor, he must have participated in or have been cognizant of the grantor's unlawful motives when he accepted the conveyance.

On appeal from a decree advised by Dodd, V. C., whose opinion is reported in *Roe v. Moore*, 8 *Stew. Eq.* 90.

Messrs. Roe & Shepherd, for appellants.

Mr. Charles D. Thompson, for respondent.

The opinion of the court was delivered by

KNAPP, J.

In my judgment, formed on carefully examining all the testimony, the court below decreed incorrectly in this case. The evidence does not, as I think, justify the conclusion of the learned vice-chancellor who heard and decided the cause, that the conveyance in question was the result of a combination of the defendants to delay or defraud the complainant, or other creditors of William Roe. If such a purpose on the part of the defendant William Roe would of itself suffice to impeach the conveyance, I should feel great unwillingness in yielding to the view of the vice-chancellor with respect to him, and the purpose which controlled him. For the same evidence which is invoked as proof of his fraud, is equally cogent in showing his design to have been merely a preference of his mother over other creditors. The *onus* of proving fraud is on the complainant who avers it. But it is too well established as the rule upon this subject, to admit of question, that in order to invalidate a conveyance on the ground that it designed the hindrance, fraud or defeat of creditors, the grantee as well must have participated in or have been cognizant of, or chargeable with knowledge of the unlawful motive, when he accepted the conveyance. *Mer-*

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chants Bank v. Northrup, 8 C. E. Gr. 582 ; *Metropolitan Bank v. Durant*, 7 C. E. Gr. 35 ; S. C., 9 C. E. Gr. 556 ; *Atwood v. Impson*, 5 C. E. Gr. 150.

Mrs. Roe, on the evidence, stands entirely clear of any just imputation against her motives, or of a design to aid her son in any fraud, if, indeed, he was moved by bad faith towards his other creditors. She was an honest and meritorious creditor of her son, having loaned to him moneys at various times out of the fund which she received from the estate of her husband, and relied upon as her only means of support in her declining years. She exhibits claims against her son so arising, certainly amounting in principal and unpaid interest to the sum of \$1,750, with others of less amount not definitely proved. The fair value of the land embraced in the deed, according to the evidence, did not exceed \$3,250, and was granted subject to a mortgage debt, principal and interest, of \$1,537. The conveyance was not to any extent voluntary, but upon full consideration. The assumption that this money was an advance or gift *inter vivos* to the son has no foundation in the proofs. She loaned to her children to aid them, rather than to strangers. They received from her not in equal amounts, but as they required aid. That she intends to let these debts make up the shares which they, respectively, shall be given on her death varies in nothing the character of the indebtedness. She may change her mind in all this arrangement at pleasure. They stand now as loans for which the law secures to her payment as upon contract on her demand.

Being, then, a valid debt, it was her legal right, acting in honesty and good faith, to secure it by encumbrance in her favor upon the property of her debtor, or absolutely to purchase it by the surrender of credits sufficient in amount to constitute an honest, adequate consideration for the sale. It was her right to be vigilant and foremost in attaining this end, although thereby other creditors were postponed or put to other disadvantage. It was equally the right of the debtor, if he so willed it, although in failing circumstances or insolvent, to prefer her in payment to other creditors. *Atwood v. Impson*, *supra* ; *Vreeland v. Jacobus*, 4 C. E. Gr. 231.

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The principles here indicated have their foundation in property rights, and rest firmly on settled adjudications of the courts; and a transaction which ranges itself within their protection, as the one in question in my judgment does, stands impregnable against any attack by other creditors. The debt due was an honest one. It was, as stated, for a considerable portion of a fund constituting the sole means of support of an aged woman, in the hands of her son as a loan. Every good instinct in such a debtor would plead for its payment or security, if within his power, to such a creditor. It was, as shown, in amount fully adequate and equal to the value as proved of the debtor's interest in the lands embraced in the conveyance, and sufficient to pay for its absolute purchase, if such had been the real purpose of the parties. As security for a loan to such an amount, every prudent lender would have rejected it.

But this conveyance, although absolute on its face, was, as is plainly deducible from the evidence, designed by the creditor as security for the payment of her debt. Her declarations and conduct show her motive to have been, not to acquire the property for a permanent possession, but to secure herself. A mortgage in form would more correctly and definitely have expressed her purpose, but the course pursued was, under the circumstances, justifiable, and relieved of all suspicion, under the belief that her debt more than equaled the value of the lands conveyed; the fair deduction from her own testimony and the whole case being that, without the delay and expense of foreclosure, she designed to sell the property to repay herself. Consistent only with this idea is her course in frankly tendering to the complainant at the first opportunity a conveyance to him of the lands, subject to her claim—an offer formally repeated in her answer filed in the cause. In her own language, all she wanted was, “to get her own—to secure her own.”

The deed in form being absolute, could, in a court of law, be given effect as such only. But here effect will be given to the intention of the parties, and what they designed as a security merely will be regarded as a mortgage. In this feature the case bears a resemblance to that of *Demarest v. Terhune*, 3 C. E. Gr.

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532, in which lands held by absolute conveyance, but designed to secure the grantee's debt, were ordered to be sold to pay first the claim of the grantee secured by his deed, and out of the surplus the costs and complainant's claim. These lands being held, then, as a pledge, it is right that the complainant should have, to apply on his judgment, whatever interest or value may possibly be found in them, beyond the principal and interest of her debt. And it is in accordance with the practice in equity to decree the sale of lands and disposition of the proceeds when trusts are found to exist, or liens or equitable rights established therein, in favor of creditors, when by such course the equitable rights of parties may be adjusted, and the form of pleading found in this case has been held to be no impediment to granting such relief. *Demarest v. Terhune, supra*; *Condit v. Blackwell, 4 C. E. Gr. 193*, and cases there cited.

The complainant could, by accepting her offer, have had, without cost, the advantage of this position. The same result may still be secured to him, by ordering the lands to be sold, if he believes, as he has averred in his bill, that they are worth, and will bring at a sale more than enough to satisfy her debt. But we think that the appellant having tendered the premises to the respondent, should not, under the circumstances, have her security diminished by the costs and expenses of a sale, if the premises shall not sell for enough to answer her demands and such cost. Against these the respondent should, before an order to sell is decreed, give satisfactory indemnity.

The case should be remitted to the court of chancery, with instructions that if the respondent shall give satisfactory security in that court for the payment of the costs and expenses of sale, which the proceeds of sale, after satisfying the debt due the appellant Mrs. Roe with interest, shall be insufficient to pay, then it be referred to a master to ascertain the amount so due to her; which sum should be declared a first lien, as between these parties upon said lands; and that there should be a decree below in favor of the respondent, and direction to a master to sell all the right, title and interest of the appellants in said lands at public sale; and the proceeds thereof should be applied first to the

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payment of the amount found to be due to the appellant Mrs. Roe with the interest; and secondly, out of the surplus, if any such there be, the costs and expenses of such sale be paid; and in the third place, the judgment of the respondent be paid. Should the respondent fail to give the required security within such time as the chancellor shall limit and appoint, that then the bill be dismissed.

The decree should be reversed, and the case remitted with these instructions to the court of chancery.

Decree unanimously reversed.

HARTMAN C. VREELAND, appellant,

v.

JOHN B. VAN BLARCOM, admr. of Benjamin Geroe, deceased,
respondent.

1. A covenant to assume a mortgage, for the payment of which the covenantee is personally responsible, binds the covenantor to pay the same.

2. An agent cannot exact from his principal any advantage growing out of a contract made by the agent in his principal's name, unless the principal has expressly authorized or ratified it, with knowledge that such advantage would accrue.

On appeal from a decree of the chancellor, based on the following opinion of John Hopper, esq., advisory master:

The bill in this case was filed to recover a deficiency existing after a foreclosure and sale of the mortgaged premises. The suit and proceedings for foreclosure and sale were had in Passaic county circuit court. No claim for deficiency was made in the bill in that case in the circuit court. Defendant's solicitor admitted the foreclosure proceedings in the circuit court, the

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amount of sale and the deficiency as stated in the bill of complaint in this cause.

The solicitor of the defendant claimed—

1. That there being no prayer for deficiency in the bill for foreclosure in the circuit court, the complainant cannot sustain a suit for the deficiency in the court of chancery. This claim I did not allow.

2. That the deed of conveyance from Moses to Brown contains “no assumption or promise” by Brown “to pay the said mortgage of complainant.” This claim I did not allow.

3. That in the conveyance by Brown to the defendant the promise of the grantee to pay the said mortgage was not made “to a party personally liable for the said mortgage debt,” and cannot be carried to the benefit of Geroe or his administrator, the complainant. This claim I did not allow.

4. That the premises having been sold under the decree of foreclosure and purchased by the complainant in his representative capacity as administrator, the complainant holds the property in place of the mortgage, to be treated by him as personal property in his accounting as administrator; but, even if this is not so, the defendant cannot be held for the deficiency until the value of the mortgaged premises shall have been ascertained. This claim was not pressed on the argument, and was not allowed.

5. That the defendant, for over twenty years, has suffered, and still suffers, from physical infirmities, which prevented him from personally attending to his business affairs; that in consequence thereof, Geroe, in his lifetime, under a general power of attorney, took charge of and managed the business affairs of the defendant, until the death of said Geroe; and that Geroe procured the sale of the premises from Brown to the defendant, he, Geroe, having a mortgage upon them, and, without informing the defendant thereof, inserted in the deed the promise to pay the mortgage. This claim I did not allow, having first heard the defendant as a witness on his own behalf.

6. That the assumption of the payment of said mortgage, contained in the deed from Brown to the defendant, was inserted

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by Geroe for his own benefit as the owner of said mortgage, and to the injury of his principal, the defendant. This claim I did not allow.

Thereupon I find that the complainant is entitled to recover from the defendant the sum of \$3,887.97, as deficiency &c. and advise a decree accordingly.

Mr. Henry A. Williams, for appellant.

Mr. Isaac Van Wagoner, for respondent.

The opinion of the court was delivered by

DIXON, J.

Benjamin Geroe was the holder of a mortgage on lands of Anna M. Moses, securing a bond for \$7,000, given by her and her husband to said Geroe. Subsequently, Moses and wife conveyed the lands to Reuben V. Brown, by a deed reciting that the land was subject to said mortgage, and adding the words, "which said party of the second part assumes." Thereafter Brown conveyed to the defendant, Hartman C. Vreeland, by a deed containing a clause to the effect that the grantee assumed the payment of the mortgage. The complainant, administrator of Geroe, seeks to hold Vreeland on said assumption, for a deficiency due on the bond after exhausting the mortgage security.

The defendant first insists that the covenant in the deed to Brown did not bind him personally to the payment of the mortgage debt, and hence the covenant in the deed to the defendant did not enure to the benefit of the mortgagee. The claim is that to assume a mortgage is not equivalent to an agreement to pay the debt. The language, however, clearly imports that the covenantor takes something upon himself personally with reference to the mortgage. Presumptively, this must be something beneficial to his covenantees, else they would not have required it; and I can perceive no personal obligation beneficial to Mr. and Mrs. Moses which the parties could have intended that Brown should have assumed concerning this mortgage, except

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the duty of payment, which rested upon them. The language of the covenant bound Brown, we think, to pay the mortgage. *Sparkman v. Gove*, 15 Vr. 252.

This brings us to another position of the defendant, that Geroe's representative cannot take advantage of this alleged promise of the defendant, because of the circumstances under which it was inserted in the deed.

The answer and testimony make plain the following facts: That the defendant is, and for many years has been, mentally imbecile; that Geroe had charge of his affairs, as his agent and *quasi* guardian; that Geroe mainly negotiated, on behalf of the defendant, the exchange of properties in which the deed containing the alleged assumption was given; that Geroe himself prepared the deed, and was present at its delivery; that the defendant had no knowledge of the clause binding him to pay the mortgage; and that the mortgage was not, so far as even the grantor, Brown, can recollect, a subject of conversation between either himself and Geroe, or himself and the defendant. These facts lead to the conclusion that Geroe, while acting as agent of the defendant, inserted this term in the contract between his principal and Brown, to increase his principal's burdens for his own personal benefit, without the authority or knowledge of his principal, and without its being demanded by Brown. This conclusion establishes the invalidity of the complainant's claim in this cause. An agent cannot exact of his principal any advantage growing out of a contract made by the agent in his principal's name, unless the latter has expressly authorized or ratified it, with knowledge that such advantage would accrue. *Story on Agency* §§ 207, 210, 211.

For this reason the decree in the complainant's favor, rendered on advice of the advisory master, should be reversed, and the bill dismissed, with costs.

Decree unanimously reversed.

Cutter v. Kline.

HAMPTON CUTTER, appellant,

v.

MILLER KLINE, respondent.

1. The record of a judgment at law imports absolute verity. The court of chancery cannot examine or determine whether it expresses the judicial determination of the court in which it was pronounced, or whether it was entered up, by mistake of the clerk, different from what it ought to have been or was intended to be.

2. A judgment of the circuit court, upon proceedings to enforce a lien claim, may be general or special, or both. If, when the proceedings are against the same person as builder and owner, the record shows a general judgment only, the court of chancery, in the absence of fraud or imposition, cannot directly or indirectly impose the debt involved therein as a lien on the lands in question, on the ground that it ought to have been recorded as a special as well as a general judgment, and was erroneously recorded by mistake of the clerk.

The opinion of the chancellor is reported in *Kline v. Cutter*, 7 *Stew. Eq.* 329.

Mr. G. R. Lindsay, for appellant

Mr. B. A. Vail, for respondent.

The opinion of the court was delivered by

MAGIE, J.

The facts of this case are so fully presented in the opinion of the chancellor, that it seems unnecessary to repeat them in detail.

NOTE.—As against a subsequent *bona fide* purchaser or encumbrancer, equity will not relieve against judgments not docketed, through the mistake of the clerk, although taken to him for that purpose, *Landon v. Ferguson*, 3 *Russ.* 349; *Sanchez v. Curriaga*, 31 *Cal.* 170; *Buchan v. Sumner*, 2 *Barb. Ch.* 164; *McCleary's Appeal*, 1 *Watts & Serg.* 299; *Koplin v. Anderson*, 88 *Ill.* 120; *Ridley v. McGehee*, 2 *Dev.* 40. See *Foster v. Chapman*, 4 *McCord* 291; *Robertson v. Travis*, 5 *La. Ann.* 401; *Dawson v. Scriven*, 1 *Hill Ch.* 177; *Ferguson v. Staver*, 40 *Pa. St.* 213; *Appleby v. Barry*, 2 *Rob. (N. Y.)* 689; *Cornelius v. Grant*, 8 *Mo.* 59.

In December, 1828, judgment was recovered against one who was after-

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It will be sufficient, for an understanding of the conclusions arrived at, to state the following facts only.

A judgment in favor of Ayres, Lufbery & Co. was entered against John T. Hewit, in the minutes of the circuit court of Union county. The summons and proceedings were upon a claim, under the mechanics' lien law, previously filed in the clerk's office, and were against Hewit as both builder and owner. The judgment, as entered in the minutes, was both general and special, as permitted by the statute. If such was the judicial determination of the court, it is conceded that the judgment was a lien on the lands described therein, prior to a mortgage thereon

wards found to have been a lunatic in 1828, and the *issue* was docketed, which the officer testified was the only docket shown to persons searching for judgments, and that no further docketing of a judgment was ever made without an application by the attorney. A mortgage given in 1830, by order of the court, on the lunatic's lands, was held prior to the judgment, *Braithwaite v. Watts*, 2 Cr. & Jer. 318. See *Mann's Appeal*, 1 Pa. St. 24.

If the officer, in entering a judgment, omits the initial letter in defendant's name, which distinguishes him from other persons of a similar name, whereby a purchaser of defendant's real estate was misled, although the judgment would be binding on the parties thereto, there could be no recovery of the land against such purchaser, *Wood v. Reynolds*, 7 Watts & Serg. 406; *Ridgway's Appeal*, 15 Pa. St. 177; *Sale v. Crompton*, 2 Strange 1209; *Shirley v. Phillips*, 17 Ill. 471. See *Hart v. Reynolds*, 3 Cow. 39, note; *Blossom v. Barry*, 1 Lans. 190; *Geller v. Hoyt*, 7 How. Pr. 265.

Defendant's recognizors are bound only for the amount of the judgment as docketed, although by mistake of the prothonotary that amount was much less than the amount actually recovered, *Crutcher v. Com.*, 6 Whart. 340.

A judgment for \$3,000, payable in annual installments of \$500, was docketed by the prothonotary for only \$500, and subsequent judgment creditors were held entitled to priority of lien on defendant's lands, beyond the \$500, *Hance's Appeal*, 1 Pa. St. 408; *Bear v. Patterson*, 3 Watts & Serg. 233; *Mehaffy's Appeal*, 7 Watts & Serg. 200; *Hunt v. Grant*, 19 Wend. 90.

A mistake in docketing the date on which the judgment was recovered, has been held not to affect its lien, even against subsequent judgment creditors, *Sears v. Burnham*, 17 N. Y. 445; *Fish v. Emerson*, 44 N. Y. 376; *Sears v. Mack*, 2 Bradf. 394; *Edwards v. Sams*, 3 Bradw. 168. See *Hodgen v. Guttery*, 58 Ill. 431; *Stedman v. Perkins*, 42 Me. 130; *Neele v. Berryhill*, 4 How. Pr. 16.

A *bona fide* purchaser of lands is not affected by the mistakes of the register in recording a prior deed or mortgage, as in the description of the premises, *Chamberlain v. Bell*, 7 Cal. 292; *Sanger v. Craigie*, 10 Vt. 555; *Barnard v. Campau*, 29 Mich. 162; *Barrows v. Baughman*, 9 Mich. 213; *Lally v. Holland*,

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held by Hampton Cutter. The judgment was assigned to Miller Kline, and was afterward recorded, but only as a general judgment against Hewit. If the record expresses the judicial determination of the court, it is conceded that the judgment became a lien subsequent to the Cutter mortgage. It is admitted in this cause that the recording of the judgment only as general, and not as general and special, was a mistake of the clerk of the circuit court. There was no claim that there was any fraud or imposition on the part of Cutter.

Upon the ground of the admitted mistake in the record, the chancellor decreed that the indebtedness, represented by the

1 *Swan* 396; *Baldwin v. Marshall*, 2 *Humph.* 116; *Banks v. Ammon*, 27 *Pa. St.* 173; *Bowen v. Galloway*, 98 *Ill.* 41; *Wait v. Smith*, 92 *Ill.* 385; *Jones v. McNarrin*, 68 *Me.* 334; *Thorp v. Merrill*, 21 *Minn.* 336; *Nelson v. Wade*, 21 *Iowa* 49. See *Brown v. Kirkman*, 1 *Ohio St.* 116; *Merrick v. Wallace*, 19 *Ill.* 486; *Nattinger v. Ware*, 41 *Ill.* 245; *Shore v. Larsen*, 22 *Wis.* 142; *Gaskill v. Badge*, 3 *Lea* 144; *Simonson v. Falihee*, 25 *Hun* 570; although slight mistakes in such description will not avoid or postpone the lien, *Van Pelt v. Pugh*, 1 *Dev. & Bat.* 210; *Hughes v. Debnam*, 8 *Jones* 127; *Woodson v. Allen*, 54 *Tex.* 551; or, in the estate conveyed, *Miller v. Bradford*, 12 *Iowa* 14; *Brydon v. Campbell*, 40 *Md.* 331; or in the amount of an encumbrance, *Frost v. Beekman*, 1 *Johns. Ch.* 288, 18 *Johns.* 544; *Terrell v. Andrew Co.*, 44 *Mo.* 309; *Skinner v. McDaniel*, 5 *Vt.* 539; *Succession of Falconer*, 4 *Rob. (La.)* 7; *Gilchrist v. Gough*, 63 *Ind.* 576; *Ziel v. Dukes*, 12 *Cal.* 479; *Bond v. Pacheco*, 30 *Cal.* 530; *Hance's Appeal*, 1 *Pa. St.* 408, *supra.* See *Bell v. Fleming*, 1 *Beas.* 13, 490; or in the name of the grantor or grantee, *Jennings v. Wood*, 20 *Ohio* 261; *Dubose v. Young*, 10 *Ala.* 365; *Disque v. Wright*, 49 *Iowa* 538; *Blossom v. Barry*, 1 *Lans.* 190; *Burkhalter v. Wells*, 18 *Ga.* 367; *Peck v. Mallams*, 10 *N. Y.* 509. See *Shepherd v. Burkhalter*, 13 *Ga.* 443; *Sinclair v. Slawson*, 44 *Mich.* 123; *Garrard v. Davis*, 53 *Mo.* 322; *Luswell v. Presb. Church*, 46 *Mo.* 279; *Jones v. Parks*, 22 *Ala.* 446; *Jones v. Berkshire*, 15 *Iowa* 248; or recording in the wrong book of records, or in an out-of-the-way place, *New York Life Ins. Co. v. White*, 17 *N. Y.* 469; *Sawyer v. Adams*, 8 *Vt.* 172; *Lich's Appeal*, 44 *Pa. St.* 519; [overruled in *Glading v. Frick*, 88 *Pa. St.* 464]; *Page v. Rogers*, 31 *Cal.* 293; *King v. Young Men's Ass'n*, 1 *Woods* 386; *Parsons v. Lent*, 7 *Stew. Eq.* 67; *Conklin v. Hinds*, 16 *Minn.* 457; *Gilly v. Maass*, 28 *N. Y.* 191; *James v. Morey*, 2 *Cow.* 246; *Purdy v. Huntington*, 42 *N. Y.* 334. See *Smith v. Smith*, 13 *Ohio St.* 532; *Glading v. Frick*, 88 *Pa. St.* 460; *Paige v. Wheeler*, 92 *Pa. St.* 282; *Hesse v. Mann*, 40 *Wis.* 560; *Switzer v. Knapps*, 10 *Iowa* 72; or in the attestation clause of the deed, *Pringle v. Dunn*, 37 *Wis.* 449; *Parret v. Shaubhut*, 5 *Minn.* 323; *Williams v. Adams*, 43 *Ga.* 407. See *Whitwell v. Emory*, 3 *Mich.* 84; *Schroder v. Keller*, 84 *Ill.* 46; *Smalley v. McKilvain*, 14

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judgment, should be a lien on the premises, and that, unless Cutter (who had become the owner under a foreclosure and sale upon his mortgage) should pay that indebtedness, the premises should be sold to raise and pay the judgment of Kline before the mortgage of Cutter. This practically established the judgment as general and special, notwithstanding the record.

This decree is objected to on several grounds. The main contention is that the relief granted is not within the power of the court of chancery. The case shows that Kline has unsuccessfully applied to the circuit court for the correction of the record. The hardship of his case, upon the conceded facts, inclines us

Ga. 252; or, in the omission of the seals, from the record, *Starkweather v. Martin*, 28 *Mich.* 471; *Williams v. Bass*, 22 *Vt.* 352; *Switzer v. Knapps*, 10 *Iowa* 72. See *Geary v. City of Kansas*, 61 *Mo.* 378; *Smith v. Dale*, 13 *Cal.* 510; *Jones v. Martin* 16 *Cal.* 165; *Hughes v. Debnam*, 8 *Jones* 127; *Griffin v. Sheffield*, 38 *Miss.* 359; or, the acknowledgment, *Wood v. Cochrane*, 39 *Vt.* 544; *Taylor v. Harrison*, 47 *Tex.* 454. See *Brooke's Appeal*, 64 *Pa. St.* 127; *Tousley v. Tousley*, 5 *Ohio St.* 78; or, the schedules annexed to a deed of trust, *McKinnon v. McLean*, 2 *Dev. & Bat.* 79; or, of the date when received for registry, *Melts v. Bright*, 4 *Dev. & Bat.* 173. See *Horsley v. Garth*, 2 *Gratt.* 471; or, that the record is partly printed, *Maxwell v. Hartman*, 50 *Wis.* 660; or in pencil, *Caldwell v. Center*, 30 *Cal.* 539.

An omission of a deed or encumbrance from the index does not impair its lien, since indexing is no part of the registering, *Curtis v. Lyman*, 24 *Vt.* 338; *Bishop v. Schneider*, 46 *Mo.* 473; *Mutual Life Ins. Co. v. Dake*, 1 *Abb. N. C.* 381; *Chatham v. Bradford*, 50 *Ga.* 327; *Schell v. Stein*, 76 *Pa. St.* 398; *Comrs. v. Babcock*, 5 *Oreg.* 472; *Green v. Garrington*, 16 *Ohio St.* 548; *Temple v. People*, 6 *Bradw.* 378; *Dodd v. Doty*, 98 *Ill.* 393; *Jordan v. Hamilton Bank*, 11 *Neb.* 499; *Peck v. Mallams*, 10 *N. Y.* 509. See *Speer v. Evans*, 47 *Pa. St.* 141; *Barney v. McCarty*, 15 *Iowa* 510; *Hunter v. Windsor*, 24 *Vt.* 327; *Wood's Appeal*, 82 *Pa. St.* 116; *Dikeman v. Puckhafer*, 1 *Daly* 489; *Howe v. Thayer*, 49 *Iowa* 154; *Benton v. Nicoll*, 24 *Minn.* 221; *Sternberger v. McSween*, 14 *S. C.* 35; *Oconto Co. v. Jerrard*, 46 *Wis.* 317; *Irish v. Harvey*, 44 *Pa. St.* 76.

Equity will not relieve because the judge of the law court sustained complainant's motion for a new trial, but the clerk of that court omitted to enter the judgment on the motion, *McRaney v. Coulter*, 39 *Miss.* 390; nor because the clerk entered a judgment by default, contrary to the statute, *Chipman v. Bowman*, 14 *Cal.* 157; or, *nil dicit*, instead of by the court, *State Bank v. Young*, 2 *Ind.* 171; or, on a verdict, instead of *nil dicit*, *Bank of Tennessee v. Patterson*, 8 *Humph.* 363.

So, where in docketing a judgment against Palmer Sumner, the clerk

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to uphold the decree if it be possible. But the question is to be considered not only with reference to the situation of this case, but also with regard to the propriety of permitting the examination of and interference with the recorded judgment of a court.

It will be perceived that the question thus presented is not whether a court of chancery may control or even prohibit the inequitable use of a judgment of a court of law, or the process issued thereon. Such a power has been long conceded to that court, and beneficially exercised. But the question here is whether the court of chancery may go behind the record of a court of

entered it under P instead of S, whereby a subsequent lienor was misled, *Buchan v. Sumner*, 2 Barb. Ch. 164.

So, where the clerk of the court in which the judgment was entered, did not mark the declaration "filed," and entered "no papers" opposite the name of the case, on the trial list, and afterwards crossed off this entry, *Shepard v. Akers*, 3 Tenn. Ch. 215. See *Wooster v. McGee*, 1 Tex. 17; *Laflin v. White*, 38 Ill. 340.

Although a *bona fide* purchaser is not affected, the clerk and his sureties are liable, for his errors, to a prior purchaser, *Governor v. Dodd*, 81 Ill. 162; *Shell v. Stein*, 76 Pa. St. 398; *Harlow v. Birger*, 30 Ill. 425; *Terrell v. Andrew Co.*, 44 Mo. 309; *Bishop v. Schneider*, 46 Mo. 472; *Gilchrist v. Gough*, 63 Ind. 587; *Smith v. Royalton*, 53 Vt. 604; *Siewers v. Com.*, 87 Pa. St. 15; *Douglass v. Yallop*, 2 Burr. 722. See *Lovett v. Demarest*, 1 Hal. Ch. 113; 10 Cent. L. J. 81; *Kimball v. Connolly*, 2 Abb. Ap. Dec. 504; *Heriot v. McCauley*, Riley Ch. 19; *Burley v. Weller*, 14 W. Va. 264; *Parkes v. Davis*, 16 Iowa 20; and not the attorney of record, *Stephens v. Douney*, 53 Pa. St. 424.

Equity has granted relief, however, in the following cases:

Where a clerk entered an appeal in an unusual place on the docket, and the counsel of defendant searched unsuccessfully for it, and then requested the clerk to notify him as soon as the appeal should be entered, which the clerk promised, but neglected to do, *Seymour v. Miller*, 33 Conn. 402.

Where a statute required chattel mortgages to be recorded within thirty days after execution, one left for record five days before the expiration of the thirty days, but not recorded by the clerk until two days after the expiration of the thirty, was held good against a subsequent judgment creditor, *McGregor v. Hall*, 2 Stew. & Port. 397; *Harrold v. Simonds*, 9 Mo. 326.

Where a statute made mortgages "operative as a record" from the day of their delivery for record—Held, that an error of the recording officer did not impair its lien for the full amount. *Mims v. Mims*, 35 Ala. 23; *Bank of Kentucky v. Haggin*, 1 A. K. Marsh. 306; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh.

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law, and examine and determine whether the record has been correctly made up by the official charged with that duty, so as to express the judicial determination of the court; and whether, upon its conclusion that the record is erroneous, it may make the judgment other than what the record shows.

No aid in the solution of this question is derived from the fact that the parties in this cause have admitted the mistake, and have thus submitted the matter to a court of equity. Consent cannot confer jurisdiction. If such jurisdiction exists, it extends to all cases. It will justify a court of equity in taking proof to determine whether or not the official recorder of another court

545; *McGowen v. Hoy*, 5 Litt. 239; *Breckinridge v. Todd*, 3 Mon. 52; *Polk v. Cosgrove*, 1 Biss. 437; *Riggs v. Boylan*, Id. 445; *Brown v. Kirkman*, 1 Ohio St. 116; *Beverly v. Ellis*, 1 Rand. 102; *Nichols v. Reynolds*, 1 R. I. 30; *Cook v. Hall*, 6 Ill. 575; *Craig v. Dimock*, 47 Ill. 308; *Throckmorton v. Price*, 28 Tex. 605; *Williams v. Birbeck*, Hoffm. Ch. 359; *Brooke's Appeal*, 64 Pa. St. 127; *Wood's Appeal*, 82 Pa. St. 116; *Gorham v. Summers*, 25 Minn. 81; *Clader v. Thomas*, 89 Pa. St. 343; *Phillips v. Campbell*, 1 Tenn. 235; *Worcester Bank v. Cheney*, 87 Ill. 602; *State v. Rogillio*, 30 La. Ann. 833; *Lawton v. Gordon*, 37 Cal. 202; *Warnock v. Wightman*, 1 Brev. 331; *Donald v. Beals*, 57 Cal. 399. See *Hickman v. Perrine*, 1 Coldw. 135; *Handley v. Howe*, 22 Me. 560; *McLarren v. Thompson*, 40 Me. 284; *Whalley v. Small*, 25 Iowa 184; *International Ins. Co. v. Scales*, 27 Wis. 640; *Johnson v. Burden*, 40 Vt. 567; *Kiser v. Heuston*, 38 Ill. 252; *Sternberger v. McSween*, 14 S. C. 35; *Scott v. Doe*, 1 Hempst. 275.

So, where the death of the clerk prevented timely registry, *Moore v. Collins*, 3 Dev. 126.

An endorsement "Filed &c.," by a deputy or one in charge in the clerk's place, will not invalidate the registry. *Bishop v. Cook*, 13 Barb. 326; *Oats v. Walls*, 28 Ark. 244; *Cook v. Hall*, 1 Gilm. 575; *Dodge v. Trotter*, 18 Barb. 193; *Wade on Notice* § 146; *Tousley v. Tousley*, 5 Ohio St. 79; *Farmers Bank v. Chester*, 6 Humph. 458; *Beaumont v. Yeatman*, 8 Humph. 542; *Maley v. Tipton*, 2 Head 403; *Muller v. Boggs*, 25 Cal. 175; otherwise, if the endorsement &c. be by one without any authority whatever, *Wilson v. Eifler*, 11 Heisk. 179; *Montgomery v. Buck*, 6 Humph. 416; *Smith v. Brannan*, 13 Cal. 107; *Taliaferro v. Pryor*, 12 Gratt. 277.

That a clerk, by mistake, entered two recognizances against complainant instead of one, and the plaintiff below recovered a judgment against complainant on the second recognizance, after a recovery on the first one, is ground for relief, *Collier v. Euston*, 2 Mo. 145; but that the clerk wrote the word "plaintiff" in entering a judgment, instead of "defendant," is no ground, *Coop v. Northcutt*, 54 Mo. 128.

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has properly performed his duty. Since such a recorder is bound to enter in the record only the judicial determination of the court, the jurisdiction now under discussion must include the power to examine and decide what the judicial determination of the court in fact was, and that not by the record but by evidence *aliunde*.

Considering the judgment in question, without reference to its peculiar character under the mechanics' lien law, there are certain rules which are fundamental, and so established as to need no citation of authorities. Respecting the record of judgments, two questions may be raised. One respects the jurisdiction of

Clerical mistakes in entering judgments on mechanics' liens are amendable, *Horstkotte v. Menier*, 50 Mo. 158; *Mann v. Schroer*, Id. 306.

Equity has refused to enjoin a judgment at law, on account of the following defects:

AFFIDAVITS.

In attachment failing to state that plaintiff's was "a just claim," *Ludlow v. Ramsey*, 11 Wall. 581; *Turner v. Breeden*, 2 Lea 713. In a criminal proceeding being invalid, *Joseph v. Burk*, 46 Ind. 59; *Schroal v. Madison*, 49 Ind. 329.

To enter a judgment on bond and warrant, not setting out the true consideration of the debt, *Jackson v. Darcy*, Sax. 194; *Cammack v. Johnson*, 1 Gr. Ch. 163, 172; *Stratton v. Allen*, 1 C. E. Gr. 229; *Reiley v. Johnston*, 22 Wis. 279.

AMENDMENTS.

Because an amended attachment included lands privately sold by the defendant therein, pending the original attachment, *Tilton v. Cofield*, 93 U. S. 163.

JURISDICTION.

Because the court in which the judgment was recovered had no jurisdiction, *Hart v. Lazron*, 46 Ga. 396; *Ansley v. Glendening*, 56 Ga. 286; *Grass v. Hess*, 37 Ind. 193. See *Hoagland v. Creed*, 81 Ill. 506; *Blackburn v. Bell*, 91 Ill. 434; *Wilson v. Sparkman*, 17 Fla. 871; *Howard v. Pierce*, 38 Mo. 296.

PARTIES.

Because an executor sued his co-executor at law, *McDowall v. McDowall*, 1 Bail. Eq. 324.

Because no guardian *ad litem* had been appointed to defend an infant, *Lemon v. Sweeny*, 6 Brad. 507; *Drake v. Hanshaw*, 47 Iowa 291. See *Johnson v.*

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the court over the subject matter adjudicated upon. The other relates to the existence of the adjudication. The latter question is to be tried only by the record. If jurisdiction be admitted, the record is said to import absolute verity, and no averment or proof to the contrary can be received.

This rule excludes even the minutes of the court whose record is under consideration, if offered to contradict the record. *Den v. Downam*, 1 Gr. 135.

I cannot think any doubt can exist that the decree in this case violates these rules. The record is admitted; the jurisdiction of the circuit court over the subject matter has not been

Wright, 27 Ga. 555; *Colley v. Duncan*, 47 Ga. 668; *Bailey v. McGinniss*, 57 Mo. 362.

Because the summons was issued against G. H. G., administrator of J. G., and served on J. H. G., who was the administrator of J. G., *Graham v. Roberts*, 1 Head 56.

Because an attachment issued against a seaman while at sea, *Bissell v. Bowman*, 2 Dev. Eq. 154; *Norris v. Campbell*, 27 Md. 688.

Because an executor of one whose lands were sold to pay debts had not been joined in the action, although he had been joined in the subsequent *sci. fa.*, *Eyster's Appeal*, 65 Pa. St. 473.

Because judgment had been confessed by one partner for the firm in a suit pending against them, *Howe v. Woolsey*, 2 Ew. Ch. 289.

Because infants had not been joined in proceedings to enforce a note given for the purchase-money of the infants' land at an orphans court sale, although they had been parties to the original proceedings, *Chambers v. Penland*, 78 N. C. 53.

Because the plaintiff at law was dead before judgment was recovered in his name, *Williamson v. Applebury*, 1 Hen. & Munf. 206; *Coleman v. McAnulty*, 16 Mo. 173.

Because process was served on the wrong party, who made no defence, *Chisholm v. Anthony*, 2 Hen. & Munf. 13; *Givens v. Tidmore*, 8 Ala. 746.

Because judgment was given against "M. & S., partners &c.," *McIndoe v. Hazelton*, 19 Wis. 567.

SUMMONS.

Because defectively served, as appears by its return, *Coon v. Jones*, 10 Iowa 131; *Goolsby v. St. John*, 25 Gratt. 146; *Harris v. Gwin*, 10 Sm. & Marsh. 563; *Price v. Simol*, 6 Cal. 294. See *Kibbe v. Benson*, 17 Wall. 624.

Because served out of the bailiwick, and the sheriff failed to return *non est*, as he promised the defendant therein, *Gardner v. Jenkins*, 14 Md. 58. See *Higgins v. Bullock*, 73 Ill. 205.

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questioned, and is in fact unquestionable, and the record expresses a complete judicial determination. The decree invades the record, and assumes the right to determine that it is not the verity it imports to be. In this respect, I conceive it to be an entire innovation upon the recognized rules regulating the mode of dealing with judgments at law by courts of equity.

Lord Chancellor Ellesmere, between whom and Lord Coke occurred the memorable contest respecting the right of equitable interference with proceedings at law, has laid down the principles on which such interference would be justified. *Earl of Oxford's Case*, and the note in 2 *Lead. Cas. in Eq.* 76. He said:

Because never served, although the sheriff had returned otherwise, *Secor v. Woodward*, 8 *Ala.* 500; *Crafts v. Dexter*, *Id.* 797; *Fowler v. Lee*, 10 *Gill & Johns.* 358; *Gregory v. Ford*, 14 *Cal.* 138; *Partin v. Luterloh*, 6 *Jones Eq.* 341; *Mason v. Miles*, 63 *N. C.* 564; *Walker v. Robbins*, 14 *How. (U. S.)* 584; *Comstock v. Clemens*, 19 *Cal.* 77; *Stites v. Knapp*, 1 *Ga. Dec.* 36; *Gates v. Lane*, 44 *Cal.* 392. But see *Lucas v. Waller*, *Morris* 303; *Stubbs v. Leavitt*, 30 *Ala.* 352; *Robinson v. Reid*, 50 *Ala.* 69; *Martin v. Parsons*, 49 *Cal.* 94; *Grass v. Hess*, 37 *Ind.* 193; *Givens v. Campbell*, 20 *Iowa* 79; *Ridgeway v. Bank*, 11 *Humph.* 523; *Bell v. Williams*, 1 *Head* 229; *Southern v. Croft*, 43 *Miss.* 508; *Cooper v. Tyler*, 46 *Ill.* 462; *Ryan v. Boyd*, 33 *Ark.* 778; *McNeill v. Edie*, 24 *Kan.* 108; *Connell v. Stelson*, 33 *Iowa* 147.

Because a non-resident defendant was enticed into the state, and then served, *Marsh v. Bast*, 41 *Mo.* 493.

Because the sheriff's return was irregular, *Bolling v. Anderson*, 1 *Tenn. Ch.* 136; *Logan v. Hillegas*, 16 *Cal.* 200.

Because there was no revenue stamp attached, *Wilsey v. Maynard*, 21 *Iowa* 107.

Because there was no seal attached, *Logan v. Hillegas*, 16 *Cal.* 200.

Because it was returnable, and returned, in four days instead of five, *Ballinger v. Tarbell*, 16 *Iowa* 491.

Because defendant was privileged from arrest when process was served on him, *Peters v. League*, 13 *Md.* 58; *Gage v. Clark*, 22 *Ind.* 163.

Because the defendant, although served, was misnamed, *Graham v. Roberts*, 1 *Head* 56; *Swinin v. Sampson*, 6 *La. Ann.* 799.

PLEADINGS.

Because there was no state of demand, *Jackson v. Darcy*, *Sax.* 194.

Because the state of demand was informal, *Burk v. Wheat*, 22 *Kan.* 722.

TRIAL.

Because without a jury, as required by statute, *Blanch v. Speckman*, 23 *La. Ann.* 146; *Maxwell v. Stewart*, 23 *Wall.* 77.

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“In this case [where there had been a judgment at law] there is no opposition to the judgment, neither will the truth or justice of the judgment be examined in this court, nor any circumstance depending thereupon, but the same is justified and approved.” He further expresses this conclusion: “When a judgment is obtained by oppression, wrong or a hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party.” From that time the distinction thus laid down has, so far as I can find, been sedulously adhered to. The jurisdiction of courts of chancery in this respect has been confined to cases where fraud

Because of an adjournment by a justice for a time longer than the statute allowed, *Ewing v. Nickle*, 45 Md. 413.

Because two causes were consolidated without an order of the court, *Saunders v. Albritton*, 37 Ala. 716.

Because a change of venue was allowed on an insufficient affidavit, *Triplett v. Scott*, 5 Bush 81.

Because a continuance was refused illegally, *Hamilton v. Dobbs*, 4 C. E. Gr. 27; *Western v. Woods*, 1 Tex. 1; *Naylor v. Phillips*, 2 Stew. & P. 58; *Syme v. Montague*, 4 Hen. & Munf. 180.

Because a justice adjourned without designating a time or place for trial, and afterwards gave judgment without notice, *Crandall v. Bacon*, 20 Wis. 639. See *Devinney v. Mann*, 24 Kan. 682.

Because moved by the plaintiff, in violation of a verbal agreement between the attorneys for its continuance, *Ableman v. Roth*, 12 Wis. 81. See *How v. Mortell*, 28 Ill. 478; *Foote v. Despair*, 87 Ill. 28; *Kent v. Ricards*, 3 Md. Ch. 392; *Booth v. Stamper*, 6 Ga. 172.

That one of complainant's important witnesses testified erroneously because he was intoxicated, *Governor v. Barrow*, 13 Ala. 540.

Because competent evidence was excluded, *Stockton v. Briggs*, 5 Jones Eq. 309; *Dunn v. Fish*, 8 Blackf. 407; *Beavan v. Monroe*, 7 Leigh 364; *Merritt v. Baldwin*, 6 Wis. 439; *Vaughn v. Johnson*, 1 Stock. 173; *Hart v. Life Assn.*, 54 Ala. 495. See *Ambler v. Wild*, 2 Wash. (Va.) 36; [denied in *Fentress v. Robins*, N. C. Term 177]; or incompetent admitted, *Merritt v. Baldwin*, 6 Wis. 439.

Because complainant had been deprived of a new trial at law through the judge's omission and neglect to take down the evidence, *Dibble v. Truluck*, 12 Fla. 185.

Because a new trial was erroneously denied, *Smith v. Lowry*, 1 Johns. Ch. 320; *Camman v. Traphagen*, Sax. 28, 230; *Reynolds v. Houne*, 12 B. Mon. 234; *Haughey v. Strang*, 2 Port. 177; *Meredith v. Benning*, 1 Hen. & Munf. 584; *Chapman v. Scott*, 1 Cranch C. C. 303; *Railroad Co. v. Neal*, 1 Woods 353; *Holmes v. Steele*, 1 Stew. Eq. 173.

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or a hard conscience had either obtained an inequitable judgment, or were making inequitable use of a judgment. I can find in no case an assertion of a right to examine and determine whether the judicial determination of a court is other than that its record shows.

In the opinion of the chancellor, but one case is cited in support of this power. It is the case of *Loss v. Obry*, decided by Chancellor Zabriskie, and reported in 7 C. E. Gr. 52. Upon examination it will be found that what was decided in that case cannot be considered authority for the assertion of power contained in this decree. The bill was filed to reform two deeds on

Because the court of law had mistaken or overlooked material facts in the record, *Russell v. Slaton*, 38 Ga. 195; *Cameron v. Bell*, 2 Dana 328.

Because the court ruled out a plea that plaintiff had verbally agreed to surrender the bond on which the action was brought, *Moore v. Dial*, 3 Stea. (Ala.) 155; *Parker v. Holmes*, 4 N. H. 97; *Dow v. Tuttle*, 4 Mass. 414. See *French v. Garner*, 7 Port. 549; *Strong v. Hopkins*, 1 Mo. 530; *Mewborn v. Glass*, 5 Humph. 520; *Gwinn v. Newton*, 8 Humph. 710; *Hibbard v. Eastman*, 47 N. H. 507; *Blakesley v. Johnson*, 13 Wis. 530; *Gibbons v. Scott*, 15 Cal. 284; *Metter v. Metter*, 4 C. E. Gr. 467.

Because complainant neglected to move for a new trial at law, within the time limited there, *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Jones v. Watkins*, 1 Stew. (Ala.) 81.

Because defendant was unable to attend the trial at law, owing to public excitement and danger, *George v. Tutt*, 36 Mo. 141. See *Coffee v. Nealy*, 2 Heisk. 304; *Harvey v. Seashol*, 4 W. Va. 115; or, an epidemic, *Townsend v. Branch Bank*, 9 Ala. 120; or, threats of bodily harm, *Duncan v. Gibson*, 45 Mo. 352.

Because a third person stated to complainant that he had arranged the matter with the plaintiff below, who afterwards took a judgment by default, *Gamble v. Campbell*, 6 Fla. 347; *Walker v. Shreve*, 87 Ill. 474.

JUDGMENT.

Because entered by confession in vacation, contrary to the statute, *De Riemer v. Cantillon*, 4 Johns. Ch. 85.

Because entered on a motion, after the expiration of the statute allowing such entries, *Turpin v. Thomas*, 2 Hen. & Munf. 139. See *Joseph v. Burk*, 46 Ind. 59.

Because entered for more than was due the plaintiff therein, *Greaves v. Strithe*, 2 Dick. 469; *Gooleby v. St. John*, 25 Gratt. 146; *Rust v. Ware*, 6 Gratt. 50; *Woods v. Macrae*, Wythe 253; *King v. Vaughn*, 8 Yerg. 60; *Benton v. Roberts*, 3 Rob. (La.) 224; *Palmer v. Malone*, 1 Heisk. 549; *Stinson v. Hill*, 21

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account of a mistake, whereby more land was conveyed than was intended and agreed. One of the deeds had been made by a special guardian of infants. He had, under the statute, reported the sale to the chancellor. The report had been confirmed and a deed directed to be made. The deed was in conformity with the order of confirmation and the report. The mistake originated in the report, the guardian having reported an agreement with the defendants in the bill for the sale of the whole of the infants' land, when in fact the agreement was for the sale of a part only. The order of confirmation and the proceedings not only were in the court of chancery and within the control of the

La. Ann. 560; *Yantis v. Burdett*, 3 *Mo.* 457; *Bank of Tennessee v. Patterson*, 8 *Humph.* 363. See *Jones v. Neely*, 82 *Ill.* 71; *Scriven v. Hursh*, 39 *Mich.* 98; *Babcock v. McCumant*, 53 *Ill.* 214; *Hodges v. Planters Bank*, 7 *Gill & Johns.* 306; *Chase v. Manhardt*, 1 *Bland* 533; *Blizzard v. Bross*, 56 *Ind.* 74.

Because entered on bonds issued under a law admitted to be unconstitutional, *Cassel v. Scott*, 17 *Ind.* 514. See *Reeves v. Cooper*, 1 *Beas.* 223; *Strong v. Daniel*, 5 *Ind.* 348; *Thomas v. Phillips*, 4 *Sm. & Marsh.* 358; *Green v. Robinson*, 5 *How. (Miss.)* 80.

Because by default against a corporation without an inquiry, contrary to the statute, *Boyd v. Chesapeake Canal*, 17 *Md.* 195.

Because entered against only one of two defendants, *Robb v. Halsey*, 11 *Sm. & Marsh.* 140; *Caldwell v. Stephens*, 57 *Mo.* 589.

Because entered against an executrix, individually, *Glenn v. McGuire*, 3 *Tenn. Ch.* 695; *Leonard v. Collier*, 53 *Ga.* 387.

Because entered at a wrong term, *Shricker v. Field*, 9 *Iowa* 366.

Because destroyed by casualty, *Garret v. Lynch*, 45 *Ala.* 204. See *Scott v. Watson*, 3 *Tenn. Ch.* 652; *Crim v. Handley*, 94 *U. S.* 652; *Cyrus v. Hicks*, 20 *Tex.* 483; *Chambers v. Warren*, 6 *B. Mon.* 244; 6 *Cent. L. J.* 101.

Because entered before the return day of the summons, *Davis v. Staples*, 45 *Mo.* 567.

Because a justice of the peace rendered a judgment "by default," *Hunter v. Hoole*, 17 *Cal.* 418.

Because rendered against the defendant "et al.," and at chambers, and not in term-time, *Sanchez v. Carriaga*, 31 *Cal.* 170.

Because there is a variance between the bond and warrant and their recital in the judgment confessed thereon, *Marshall v. Hart*, 4 *Minn.* 450.

Because signed at chambers without complainant's consent, *Rust v. Faust*, 15 *La. Ann.* 477.

Because entered against a firm after the death of one partner, *Lucas v. Bank of Darien*, 2 *Stew. (Ala.)* 280, 322.

Because not entered by a justice until the day after the verdict had been rendered, *Stokes v. Knarr*, 11 *Wis.* 389. See *Wiley v. Southerland*, 41 *Ill.* 25.

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chancellor, but they were, on their face, entirely correct. There was no error in the determination of the court or in its record. The error was that of the infants, or their representative, of which the defendants sought to take an unconscionable advantage. Relief was therefore properly granted.

In the opinion in that case, Chancellor Zabriskie declared that mistakes in the records of courts may be corrected by a court of equity. An examination of the cases he cited in support of the declaration will render it manifest that he did not intend to be understood as referring to other mistakes than such as appeared in the case then before him—that is, mistakes not of the court or its officials, but of the parties.

Because given against a garnishee, although no proceedings had been taken against the defendant beyond serving him with process, *Earl v. Matheney*, 60 Ind. 202.

Because founded on a British debt, which, by statute, was uncollectible, *Terrel v. Dick*, 1 Call 546.

Because a debt was divided so as to give an inferior court jurisdiction over two actions thereon, *Pryor v. Emerson*, 22 Tex. 162.

Because the damages in a judgment by default in tort are excessive, *Walker v. Shreve*, 87 Ill. 474; *Smith v. Lowry*, 3 Mon. 420. See *Anderson v. Fox*, 2 Hen. & Munf. 245; *Lewis v. Wyatt*, 2 Rand. 44.

EXECUTION.

Because the property levied on had been released by a written agreement between the parties, *Kendall v. Dow*, 46 Ga. 607.

Because after two abortive attempts to claim a homestead exemption, the sheriff refused to entertain a third, which was correct in form, *Platt v. Sheffield*, 63 Ga. 627.

Because plaintiff promised the defendant, who was a surety only, that he would issue no execution against him, if he (the defendant) would make no defence to the action, and afterwards issued it, *Mitchell v. Boyer*, 58 Ind. 19.

Because, by agreement, a judgment was to be paid within a specified time, and the plaintiff issued an execution before the expiration thereof, *Anamora v. Wurzbacher*, 37 Iowa 25; *Hibbard v. Eastman*, 47 N. H. 507.

Because more than one was issued, irregularly, *Wagner v. Peques*, 10 Rich. (N. S.) 259; *Elliott v. Elmore*, 16 Ohio 27; *Gregory v. Ford*, 14 Cal. 138; *Laselle v. Moore*, 1 Blackf. 226. See *Williams v. Wright*, 9 Humph. 493; *Huntington v. Bell*, 2 Port. 51; *Edgar v. Clevenger*, 1 Gr. Ch. 258; *Babcock v. McCamant*, 53 Ill. 214; *Yantis v. Burdett*, 3 Mo. 459.

Because the judgment was obtained against the sheriff for the proceeds of

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Thus, in *Waldron v. Letson*, 2 *McCart*. 126, the representatives of a mortgagor were enjoined from proceedings to recover lands intended and supposed to have been included in the mortgage. The mortgage had been foreclosed, and a sale of the land therein described had occurred and a deed had been made thereon. All parties supposed that the description included the land in question, when in fact it did not. The record and decree were therefore entirely correct. The error antedated the proceedings, and was participated in by all parties.

In *De Riemer v. Cantillon*, 4 *Johns. Ch.* 85, the mistake corrected occurred in a sheriff's deed, which did not include all the premises actually sold.

a sale, which had been afterwards set aside for his false return, *Tutt v. Ferguson*, 13 *Kan.* 45.

Because only three days' notice of the seizure of lands was given, whereas defendant was entitled to five, *Morgan v. Whiteside*, 14 *La.* 277.

Because no judgment had been obtained, *Laselle v. Moore*, 1 *Blackf.* 226.

Because defendant died before the teste of the writ, *Shottenkirk v. Wheeler*, 3 *Johns. Ch.* 275; *Perkins v. Bullinger*, 1 *Hayw.* 367. See *Meek v. Bunker*, 33 *Iowa* 169.

Because a *ca. sa.* issued for a fine and costs without a prior *fi. fa.*, *Atty.-Gen. v. Baker*, 9 *Rich. Eq.* 521.

Because a *sci. fa.* after a *ca. sa.* was returned at a wrong term, *Nicholson v. Patterson*, 6 *Humph.* 394.

Because never legally levied, *Buine v. Williams*, 10 *Sm. & Marsh.* 113.

Because the sheriff made no report of sale under a foreclosure, *Rogers v. Holyoke*, 14 *Minn.* 220.

Because issued more than ten years after the judgment had been recovered, contrary to the statute, *Hanson v. Johnson*, 20 *Minn.* 194.

Because several lots of land were sold together instead of separately, *Cavenagh v. Jakeway*, *Walk. (Mich.)* 344.

Because it had no seal, *Jilsum v. Stebbins*, 41 *Wis.* 235.

Because issued for a sum larger than the judgment, *Ibid.*; *Barrow v. Robichaux*, 14 *La. Ann.* 207; *Walker v. Villaraso*, 26 *La. Ann.* 42; *Robb v. Halsey*, 11 *Sm. & Marsh.* 140.

Because possession had not been delivered, by the sheriff, under a *hab. fac.*, although his return so stated, *Baker v. Morgan*, 2 *Dow* 526.

Because the value of the property seized exceeded the justice's jurisdiction, *Davis v. Staples*, 45 *Mo.* 567; *Saunders v. Albritton*, 37 *Ala.* 716. See *Breckinridge v. McCormick*, 43 *Ill.* 491; *Stroud v. Humble*, 1 *La. Ann.* 310.

Because the defendant is misnamed, *Wilton Town Co. v. Humphrey*, 15 *Kan.* 372.

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In *Barnesly v. Powel*, 1 Ves. Sr. 119, 284, a will which had been admitted to probate in the ecclesiastical courts, had, upon a bill in chancery and an issue at law, been found to be forged. The probate had been procured upon a written consent of the complainant, which the chancellor held had been fraudulently extorted. Lord Hardwicke expressly admits inability to interfere with the decree of probate, but he directed the defendants to appear before the ecclesiastical court and consent to a revocation of the probate.

I do not find in these or in any other cases which I have discovered, any assertion of a right on the part of a court of equity

Because issued on a docketed justice's judgment, which is void on its face, *Gates v. Lane*, 44 Cal. 392, 49 Cal. 266.

Because issued in the name of an administrator, on a judgment recovered by his intestate, without a *sci. fa.*, *Ammons v. Whitehead*, 31 Miss. 99; *Egbert v. Mercer*, 66 Ind. 305.

Because the lands levied on and threatened with sale had not been appraised, *Robinson v. Chesseldine*, 5 Ill. 332.

Because defendant's personal property had been seized without exhausting his lands, *Farrell v. McKee*, 36 Ill. 225.

Because the sheriff threatened to apply the proceeds of sale to satisfy junior liens on the lands sold, *Chittenden v. Rogers*, 42 Ill. 95.

Because defendants had agreed as to the portion of the judgment each would pay, *Skinner v. Barney*, 19 Ala. 698; *Knight v. Cheny*, 64 Mo. 513. See *Thompson v. Nat. Bank*, 106 Mass. 128.

Because the judgment had been reversed, *Fahs v. Roberts*, 54 Ill. 192; *McJilton v. Love*, 13 Ill. 487. See *Goodwin v. Williams*, 5 Grant Ch. 178.

Because issued prematurely, *Dayton v. Commercial Bank*, 6 Rob. (La.) 17; *Laselle v. Moore*, 1 Blackf. 226; *Sowle v. Pollard*, 14 La. Ann. 287.

Because the return of the advertisement and sale of lands, was irregular, *Wilson v. Miller*, 30 Md. 82.

Because the return stated that the sheriff had levied on part of a tract of land, *Waters v. Duvall*, 6 Gill & Johns. 76, 11 Id. 37; *Nelson v. Turner*, 2 Md. Ch. 73.

Because issued before the entry of a *remittitur* below, after an appeal, *Savoie v. Thibodaux*, 29 La. Ann. 511.

APPEAL.

Because a valid judgment had been affirmed on a void appeal, *Boone v. Poindexter*, 12 Sm. & Marsh. 640.

Because the justice left the state three days after the trial before him, and did not return until after the time for appealing had elapsed, *Smith v. De Lashmutt*, 4 Mo. 103.

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to question the regularity of a judgment at law, or to adjudge that the record thereof does not express the judicial determination of the court.

My conclusion therefore is, that if this judgment were one of an ordinary character, the record must be accepted by every other court as truly expressing the adjudication of the court, and cannot be examined into or contradicted. If there be any error, the court, whose record it is, has power to correct it.

But the judgment in question is in fact one of a peculiar character. It was rendered in proceedings taken to enforce a mechanics' lien claim. The right to such a lien is purely the

Because the judgment was rendered more than thirty days after the trial, instead of within three days, whereby complainant lost an appeal, *Sauer v. Kansas*, 69 Mo. 46.

Because pending one writ of error another had been issued, and the judgment affirmed thereon, *McClune v. Colclough*, 6 Ala. 492.

Because a judgment had been prematurely affirmed, *McCollum v. Prewitt*, 37 Ala. 573.

Because an appeal on a mechanics' lien does not qualify it as notice to a purchaser under a subsequent judgment, *Julien Gas Light Co. v. Hurley*, 11 Iowa 520.

Because complainant's counsel took an appeal, when an application for a new trial was proper, *Yancey v. Downer*, 5 Litt. 8; *Richmond R. R. v. Shippen*, 2 Putt. & H. 327.

Equity has interfered, however, in the following instances:

Where four jurors testified that they would not have found any damages in an action of slander, but for the impression that their opinions were governed by the majority, *Cochran v. Street*, *Wythe* 133. See *Sumner v. Whitley*, 1 Mo. 708.

Because a court of law refused to open its judgment, in order that the defendant therein might set up usury in the instrument on which the judgment was founded, *Wistar v. McManes*, 54 Pa. St. 318; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Hill v. Reifsnider*, 46 Md. 555.

Because commissioners appointed by the orphans court, under a testator's direction, to assign a widow's dower out of several lots, erroneously assigned it out of only one lot, *Baynard v. Norris*, 5 Gill 468. But see *Pardue v. West*, 1 Lea 729.

Where, by a mistake in printing the record of the court of appeals, establishing a will, the will is changed so that a conditional devise is given absolutely, the person affected thereby not having been a party to the suit, *Byrne v. Edmonds*, 23 Gratt. 200.

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creature of statute. However meritorious the claims of mechanics and material-men may be, there is no such equity in them as requires them to be preferred as liens, except as provided by the statute. They are, however, thus accorded a preference by way of lien, and such lien, when properly filed, may be enforced by proceedings taken in the mode, within the time and before the tribunal designated by the statute. The tribunal provided by the statute for the enforcement of such a lien is the circuit court of the county in which the building is. The owner of the lands, at the time of its enforcement, must be a party to the proceeding. But the lien, if enforced, dates back to the commencement

Because the judgment was rendered for too small an amount—even after satisfaction, *Barthell v. Roderick*, 34 Iowa 517; *Partridge v. Harrow*, 27 Iowa 96; *Cohen v. Dulose*, Harp. Ch. 102; *Chapman v. Hurd*, 67 Ill. 234; *Gump's Appeal*, 65 Pa. St. 476; *Vilas v. Jones*, 1 N. Y. 283; *Wilson v. Boughton*, 50 Mo. 17.

Where a judgment in ejectment had been recovered against complainant, because the clerk's certificate of the record of complainant's deed was October, 1823, instead of October, 1822, as, in fact, it should have been, *Hiatt v. Callo-way*, 7 B. Mon. 178. See *Munroe v. Eastman*, 31 Mich. 283; *Musser v. Hyde*, 2 Watts & Serg. 314.

Because a sheriff, by mistake, attached lot 268 instead of 287, *Wardlaw v. Wardlaw*, 50 Ga. 544; *Robins v. Swain*, 68 Ill. 197. See *Corles v. Lashley*, 2 McCart. 116.

Because notice of the judgment was not given to the defendant therein three days before issuing execution, as required by statute, *Lapene v. McCan*, 28 La. Ann. 749; *Greene v. Johnson*, 21 La. Ann. 464. See *Walker v. Villaraso*, 26 La. Ann. 42.

Because the plaintiff had promised to suspend or forego proceedings at law, but nevertheless took judgment, *Wierich v. De Zoya*, 7 Ill. 385; *Brooks v. Whitson*, 7 Sm. & Marsh. 513; *Huggins v. King*, 3 Barb. 616; *Pearce v. Olney*, 20 Conn. 544; *Webster v. Skipwith*, 26 Miss. 341; *Pelham v. Moreland*, 11 Ark. 442; *Purviance v. Edwards*, 17 Fla. 140; *Stanton v. Embry*, 46 Conn. 65, 595; *Bresnehan v. Price*, 57 Mo. 422; *Cage v. Cassidy*, 23 How. 109; *O'Neill v. Broune*, 9 Irish Eq. 131; *Gainesborough v. Gifford*, 2 P. Wms. 424; *Gillett v. Booth*, 6 Bradw. 423; *Gibby v. Hall*, 12 C. E. Gr. 282. But see *Butman v. Forshay*, 21 La. Ann. 165; *Marsh v. Lasher*, 2 Beas. 253.

Because after a summons had been returned *non est*, as defendant therein knew, the plaintiff persuaded the sheriff to alter that return without defendant's knowledge, *Chambers v. Handley*, 4 Bibb 284.

Because an execution had been levied on assets here in the hands of a foreign administrator, no administrator having been appointed here, *Grant v. McDonald*, 8 Grant Ch. 468.

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of the building. All who acquire an interest thereafter, other than as owners, are concluded by the determination, though not formally made parties. *Jacobus v. Mut. Ben. Life Ins. Co.*, 12 C. E. Gr. 604. The determination is expressed in the recorded judgment of the court.

While the court of chancery, in dealing with the lands subject to such a lien, may marshal the claim in its proper place and preserve its position as regards other encumbrances, that court has not been entrusted by the statute with the power of determining whether the lien can be enforced against the lands. The statute has entrusted that power to the circuit court. If the

Because the judge before whom an application for a new trial had been made, was, by reason of sickness, unable to determine it within the time limited by law, *Leigh v. Annor*, 35 Ark. 123.

Because a judgment in a suit against an alleged firm was rendered against one who was not a partner, nor served with process, *Purviance v. Edwards*, 17 Fla. 140; *Campbell v. Edwards*, 1 Mo. 324.

Because there was no real plaintiff, and no notice, *Nicholson v. Stephens*, 47 Ind. 185.

Because a school teacher recovered a judgment by consent for compensation as such, without having produced a certificate as required by statute, *Barr v. Deniston*, 19 N. H. 170.

Because the verdict was obtained on the testimony of one witness, whose answer was afterwards clearly contradicted in equity, *Verdier v. Hume*, 4 Hen. & Munf. 479. See *Vaughn v. Johnson*, 1 Stock. 173; *Peagram v. King*, 2 Hawks 605; *Burgess v. Lorengood*, 2 Jones Eq. 457; *Croft v. Thompson*, 51 N. H. 536.

Because a judgment in ejectment had been recovered against complainant, because the surveyor's certificate, by mistake, recited that complainant's survey was made by virtue of entry No. 964, instead of No. 946, the true number, and that there was, at the time of the trial, no official to give complainant a correct copy of the survey, *Wilson v. Kilcannon*, 1 Overt. 201.

Because the judgment was obtained by the sheriff's false return of a summons, *Owens v. Ranstead*, 22 Ill. 161; *Jones v. Neely*, 82 Ill. 71; *Hickey v. Stone*, 60 Ill. 458.

Because a judgment was affirmed through the judge's mistake in wrongly stating the bill of exceptions, *Kohn v. Lovett*, 43 Ga. 179. But see *Ford v. Weir*, 24 Miss. 563.

Because the summons was served on an agent of a corporation, who was not the proper official, *Southern Ex. Co. v. Croft*, 43 Miss. 508; *Grand Tower Co. v. Schirmer*, 64 Ill. 106; *Chambers v. Bridge Manf. Co.*, 16 Kan. 270.

Because a justice of the peace issued an execution more than five years

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latter court has, upon a proceeding duly commenced before it, adjudged the claim to be no lien thereon, no other court can question or reverse that decision, except upon review in the nature of a writ of error. When the proceeding to enforce such a lien results in a judgment against the builder alone, the owner is entitled to a judgment against the plaintiff. *Rev. p. 672 § 19.* This is evidently applicable only when the builder and owner are different persons, but when the same person is both builder and owner, a judgment against him as builder only, is a determination that the lands in question are not subject to the lien under the statute.

The record shows that such was the determination of the circuit court respecting the claim of Ayres, Lufbery & Co., representing the debt now owned by Kline. The decree below now imposes that debt as a lien on the lands. In so doing, the court of chancery has adjudicated upon a matter which the record shows was once judicially determined in the statutory mode.

If this judgment is not what the circuit court ought to have rendered, it could have been amended in that court on a proper application, or reviewed by a writ of error.

Whether the judgment is what the circuit court intended to render, cannot be questioned, because, as we have seen, the record must be considered as absolutely expressing such intention.

With these views of the case I think the decree below cannot be sustained.

This renders it unnecessary to consider the other questions

after the judgment had been rendered, contrary to the statute, *Givens v. Campbell*, 20 Iowa 79 ; *Stout v. Macy*, 22 Cal. 647 ; *North v. Swing*, 24 Tex. 193.

Because the clerk of the inferior court made a mistake in drawing an appeal bond, whereby the appeal was dismissed, *Saunders v. Jennings*, 2 J. J. Marsh. 513.

Because the private property of stockholders had been seized to satisfy a corporation debt, without certain statutory preliminaries having been complied with, *Hampson v. Weare*, 4 Iowa 13.

Because the clerk of the court neglected to set aside a judgment by default, and enter a plea as directed, *Mayo v. Bentley*, 4 Call 528.

Because the sheriff was plaintiff, and served his own process, *Knott v. Jarboe*, 1 Metc. (Ky.) 504.—REP.

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discussed, which relate to the alleged laches of Kline in applying for relief, and to the effect of the decree in the foreclosure of Cutter's mortgage, which established the priority of the mortgage over the judgment, Kline and his assignors being parties defendant in the cause, and also to the effect of an omission to endorse the issuing of the summons on the lien claim.

The true remedy of Kline was to procure an amendment of the judgment by the circuit court. If he postponed his application to that court for so long as to render the refusal of the amendment proper, he may have lost his remedy. If not guilty of laches, it may yet be within his power.

For affirmance—SCUDDER, VAN SYCKEL, COLE—3.

For reversal—DEPUE, DIXON, MAGIE, REED, GREEN, KIRK—6.

HORACE LIPPINCOTT, appellant,

v.

KETURAH M. EVENS, respondent.

1. The jurisdiction of the court of chancery in reaching property of a judgment debtor does not extend to trust property, where the trust has been created by or the fund so held in trust has proceeded from some person other than the debtor.

2. The sum of \$6,000 was bequeathed to executors in trust, to invest it and pay over the income therefrom to the daughter of the testator, with a provision that in case the daughter should at any time wish a part or the whole of said sum, it should be paid to her.

3. The husband of the daughter owned a farm; became bankrupt; the farm was sold by the assignee, and at the request of the daughter the said executors purchased the farm from the person who had bought it from the assignee.

4. The deed to the executors contained a trust clause to the effect that the daughter should be permitted to occupy the farm and receive the income arising therefrom, and that the trustees should sell to such person as she should appoint. Upon a bill filed by a judgment creditor of the daughter—*Held*, that the farm was held under a trust created by the testator and not by the debtor, and could not be reached.

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The appellant, Lippincott, recovered a judgment against Keturah M. Evens, wife of Samuel B. Evens, on a joint note executed by said Samuel B. Evens and Keturah, his wife, to said Lippincott, to raise money to pay a note of Samuel B. Evens, given for his individual debt—Keturah M. Evens signing said joint note as surety for her husband.

Judgment was subsequently recovered on said note by said Lippincott against said Keturah M. Evens alone, by default, and *fi. fa.* was issued and levy made on a farm of sixty-three and sixty-hundredths acres held by David D. Griscom in trust for Keturah M. Evens.

A creditor's bill was filed by the above-named appellant, setting out the above-named judgment and the conveyance of the above-named farm to said Griscom, and praying that said judgment be declared a lien on said farm; that the deed to said Griscom be declared void, and that the farm be sold under said judgment to make the moneys due thereon.

The answer sets out, and the proofs show, that Samuel Lippincott, father of Keturah M. Evens, left by will a legacy of \$6,000 to his executors to invest for the benefit of his daughter Keturah for life, and after her death, if she died intestate thereof, to go to her children, share and share alike.

That David D. Griscom, executor, took charge of said legacy and invested the same in the above-named farm for the benefit of said Keturah.

That no other moneys except those arising from said legacy are invested in said farm.

That said Griscom still holds said farm in trust, and that the said Keturah and her husband are now residing thereon.

A decree was made in the court of chancery dismissing the above-named bill, with costs. From this decree the complainant, Horace Lippincott, appealed.

On appeal from a decree of the chancellor, based on the following opinion of Barker Gummere, esq., advisory master:

1. I find and determine that the judgment at law recovered by the complainant against the defendant, Keturah M. Evens, is

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conclusive as between the said parties thereto, and that neither the pleadings nor the proofs in the cause disclose any grounds on which the validity and force of said judgment can be questioned in this court—the defendant merely seeks to set up matters which she might have set up in defence of the suit at law, but which she neglected to avail herself of in the suit at law.

2. I find and determine that Samuel Lippincott, the father of Keturah M. Evens, by his will gave and bequeathed to the executors thereof the sum of \$6,000 in trust, to invest the same on good security, and to collect the income or interest arising therefrom and to pay the same to said Keturah yearly during her natural life, and empowered and directed (see will) said trustees to pay her, from time to time, such part or the whole of the principal sum as she might demand, and directed said trustees to pay the said sum of \$6,000, or such part as remained in their hands, to such person or persons as she might appoint by her last will, and in default of such appointment, to pay the same, in equal shares, to the children of said Keturah. That the defendant, David D. Griscom, who was one of said executors, received the said bequest of \$6,000 upon the trusts aforesaid, and at the request of the said Keturah M. Evens invested the same in the purchase of the lands described in the bill of complaint, and took a conveyance thereof dated March 28th, 1876, substantially upon the same trusts declared in the aforesaid will. That said Keturah M. Evens shortly after demanded of the said Griscom that he should pay her a part of the principal of said bequest for her use, and the said Griscom determined to raise the sum so demanded by mortgaging said farm therefor, and that to accomplish that purpose, and by direction of said Keturah, the said Griscom, on July 15th, 1876, conveyed said lands to William C. Lippincott for the nominal consideration of \$1, and that on the same day, in the execution of the same purpose, the said Lippincott reconveyed said lands to said Griscom for the nominal consideration of \$1, upon substantially the same trusts declared in said will, but with power to mortgage said lands at the request and for the benefit of said Keturah; and that on the same day the said Griscom, at the request

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of the said Keturah, borrowed the sum of \$1,500, for her use, from the defendants, Samuel Lippincott and William G. Evens, and executed to them a mortgage upon said lands to secure said loan.

3. I find and determine that the said Griscom holds the said lands, subject to said mortgage, upon the same trusts created by the will of Samuel Lippincott, deceased; that the said lands are and constitute the said trust fund, converted into land, and that said Keturah has demanded and received of the principal of said fund only that part thereof raised by said trustee upon the mortgage aforesaid.

4. I find and determine that the investment of said trust fund of \$6,000 in land, and the aforesaid dealings with said land, were not a complete execution of the trusts declared in said will, and that the trusts are still active, and that the said Griscom is still charged with the active duties of a trustee in respect to said land, as well in respect to the children of said Keturah as to the said Keturah.

5. I find and determine that the said lands are the investment of trust funds which proceeded from a person other than Keturah M. Evens, the judgment debtor, and are held in trust for her and contingently for her children, and that such trust has been created by a person other than the said Keturah; and that this court has no power to subject the said lands to the payment of the complainant's judgment. *Hardenburgh v. Blair*, 3 Stew. Eq. 645; *Force v. Brown*, 5 Stew. Eq. 118.

6. I find and determine that the children of Keturah M. Evens have a material interest in the said lands and in this suit, and are necessary parties to the suit, and that the suit is fatally defective for want of the said parties, who are admitted to be *in esse*.

The bill of complaint must be dismissed, with costs.

The bill in this cause was filed by Horace Lippincott, as a creditor of Keturah Evens. It shows a judgment obtained by him against her, an execution returned, leaving a deficiency of

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\$556.08, after a sale of personal property and the application of the proceeds thereof to the payment of previous judgments.

It shows a levy upon a certain farm, but charges that although it belongs to Keturah Evens, the complainant is unable to obtain the benefit of the levy because the legal title is in one David Griscom, who took the deed for the same from William C. Lippincott and wife, and they from David D. Griscom, trustee, who took the deed from Jesse Evens, the son of said Keturah Evens, and the said Jesse Evens took the deed from David D. Griscom, assignee of Samuel B. Evens, the husband of the said Keturah M. Evens; that all these conveyances were made subsequent to the incurring of the debt due the complainant, and were made for the consideration of \$1. It charges that these conveyances were made for the purpose of defrauding the complainant, and that the consideration for the land sold to Jesse Evens was furnished by Keturah Evens.

The answer and proofs show that Samuel Lippincott, the father of said Keturah M. Evens, by will gave to his daughter \$6,000, upon the following trust:

“Item. I give and bequeath unto my executors hereinafter named the sum of \$6,000, in trust for the following uses and purposes: in trust, to invest the same on good security, and to collect the income or interest arising therefrom as the same falls due, and to pay the said income or interest to my said daughter, Keturah M. Evens, yearly and every year during her natural life; provided, however, that in case my said daughter, Keturah M. Evens, should at any time wish a part or the whole of the said sum of \$6,000, then I hereby authorize and direct the said trustees, or the survivor of them, to pay to her, from time to time, such part or parts of said sum as she may demand, and her receipt for any such payment shall be a full discharge to said trustees for the amount paid. At her death, the said sum of \$6,000, or such part thereof, if any, as may remain in the hands of the said trustees, or the survivor of them, to be paid to such persons as she may bequeath the same to by her last will and testament; or in case she shall die intestate, then to be equally divided among her several children, share and share alike.”

He appointed Joseph H. Lippincott, his son, and David D. Griscom, his son-in-law, executors of his will.

It appears that after the death of Samuel Lippincott, Samuel B. Evens, the husband of Keturah M. Evens, made an assign-

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ment for the benefit of his creditors by which his farm was sold, and that Keturah M. Evens was desirous that the farm should be retained, and so the trustee, at her request, invested the \$6,000, with the accrued interest, in the said land, by taking a deed from Jesse Evens, who had purchased the said farm at the assignee's sale.

The trustee thereafter held the farm in trust for Keturah, and allowed her to occupy it and receive all the rents.

Afterward, being in need of money, she applied to said Griscom to raise money upon mortgage, and he, being advised that the trust clause in the deed which he held from Jesse Evens, gave a power to sell, but not a power to mortgage, conveyed the farm to William C. Lippincott, who reconveyed with a trust clause containing a power to mortgage, by which a mortgage for \$1,500 was made, the proceeds of which was paid to Keturah Evens. Griscom still holds the title.

Mr. A. Hugg, for appellant.

Mr. F. Voorhees, for respondent.

The opinion of the court was delivered by

REED, J.

This is an effort to reach equitable property and apply it in satisfaction of a judgment. That this property exists in the shape of a trust, in which the defendant in execution is the beneficiary, is apparent. If this trust is the creation of the debtor herself, the property is amenable to the action of this court of chancery.

If it be a trust created by some one other than herself, then, by force of the statute, it is relieved of any liability to an application in liquidation of the debts of the *cestui que trust*. *Hardenburgh v. Blair*, 3 Stew. Eq. 645.

It appears in the cause that the father of the defendant, by will, left the sum of \$6,000 to his executors in trust to invest, and to collect and pay the income to Keturah M. Evens, and,

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upon her request, to pay to her a part or all of the principal sum, and in trust, upon her death, to pay the same—if still unpaid—to such persons as she, by will, may have designated.

It is perceived that the *cestui que trust*, under this instrument, had the power of complete control over the fund whenever she should choose to exercise it. Upon her demand, the trustee was to pay it over to her.

Yet, until she should choose to exercise this power, and it was executed, the trust existed; and it was not a ground for contention upon the hearing that the property, under such a trust, was within the excepted class of trusts mentioned in the statute.

The contention was that this trust became executed and that a new trust arose, the creator of which was the defendant herself, and so subjected the present property to a liability for her debts. This is claimed to result from the act of the defendant in requesting the trustee to invest the money in the property which is sought to be reached in the present suit.

He made such investment, taking a deed of the property to himself in trust to suffer her to occupy the same and receive the income, and in trust to sell to such person as she should appoint, and should she die without appointing, then to sell and pay the proceeds to such person as she, by will, should designate.

Now, had the trustee, without the request of his *cestui que trust*, made this investment, it is clear that the original trust was still an existing trust.

It is not a question now whether the change of the trust estate from money into land was beyond the power of the trustee to accomplish. The breach of his duties, as trustee, involved no determination of his fiduciary character, nor does it relieve the property into which the money can be traced from the impress of the original trust.

Nor is it a question whether the trustee can be held responsible by the *cestui que trust* for his acts in making this transmutation of property. There is more than one instance in the books where a *cestui que trust* has been held estopped by his assent to the acts of his trustee from thereafter claiming that the covenant was in breach of his duty. Indeed, this is the equitable

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rule whenever the *cestui que trust* is not, by reason of infancy or coverture, or some other disability, incapable of according any legal assent to the act of the trustee. This, however, does not operate as an extinguishment of the trust relationship, unless the act is admittedly accepted as a completed execution of the functions of the trustee.

Now it seems to me that it is apparent that so far as the intention of the parties to the transaction which changed this money into land is involved, it was their desire that the trust relationship should continue to exist. I think that it did continue to exist without a break in its continuity, and that instead of there being two trusts, it was a single continuing trust arising from the will of the father of Keturah M. Evens.

The original trust could have been extinguished by the calling in of all the money, as she did call in the \$1,500. Had she reduced it to her possession actually or constructively, any subsequent investment or transmutation upon mortgage or deed to another with whatever trust clause in her favor, would have been a creation of her own. Until she did this, I think the trust still exists. She has never had the legal title to any of the money, or to that which now represents money. Her power over the land is not greater than the power she had over the money. The trusts upon which the trustee now holds the legal title do not substantially differ from those under which he held the money. No release or receipt or acknowledgment on the part of the defendant, by which she discharges her trustee from the old trust or admits the reception of the amount held for her under the will, or its equivalent, appears in the case.

The result is, that, inasmuch as the trust still remains one not created by the defendant, the decree below must be affirmed.

Decree unanimously affirmed.

Heaton v. Merchant's Executors.

J. WESLEY HEATON, appellant,

v.

SILAS MERCHANT'S EXECUTORS, respondents.

A testator gave to J. "the amount of his indebtedness to me, which now amounts to \$8,500." J. owed the testator individually \$8,566.30, and, jointly with another person, \$1,000, *Held*, that only the individual debt was given.

On appeal from a decree of the chancellor, based on the following opinion of Van Fleet, V. C.:

The thing given is a debt due by the legatee to the testator. At the time the will was executed, and also when the testator died, the legatee owed the testator two debts, one individually and the other jointly with another person. The principal of his individual debt was \$8,566.30, and of the other \$1,000. For the last the testator held a collateral. The language of the gift is as follows: "I give to J. W. H. the amount of his indebtedness to me, which now amounts to \$8,500, and direct my executors to cancel said indebtedness." Are both debts given, or only that due by the legatee individually? I think only the last. Briefly stated, my reasons for this opinion are: 1. The amount of his individual debt approximates very closely to the sum given in the will as amount of the gift. 2. The will cannot be held to embrace the other debt, unless the testator's bounty is extended, by construction, to a person not mentioned in the words of gift. The debt is to be canceled. 3. The testator was under a written promise to surrender or re-assign the collateral he held for the joint debt. Had he intended to forgive this debt, I think it is reasonable to conclude that he would have given direction respecting the surrender of the collateral he held for it.

While I am not sure that my construction conforms exactly

Gould v. Gould.

to the intention of the testator, it seems to me to be the only one that can be adopted with a reasonable assurance that it is probably what he meant.

Mr. John W. Taylor, for appellant.

Mr. John R. Emery, for respondent.

PER CURIAM.

This decree unanimously affirmed for the reasons given in the foregoing opinion.

RICHARD SHIVERS and RICHARD L. SHIVERS, appellants.

v.

CHARLES SHIVERS, respondent.

On appeal from a decree of the chancellor, whose opinion is reported in *Shivers v. Shivers*, 5 Stew. Eq. 578.

Messrs. Bergen & Bergen, for appellants.

Mr. Alfred Hugg, for respondent.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor

CHARLES J. GOULD et al., appellants,

v

EMMA R. GOULD et al., respondents.

On appeal from a decree of the chancellor, whose opinion is reported in *Gould v. Gould*, 8 Stew. Eq. 37.

Sayre's Executors v. Sayre.

Mr. George W. Hubbell, for appellants.

Messrs. C. & R. Wayne Parker, for respondents.

PER CURIAM.

This decree unanimously affirmed for the reasons given by the chancellor.

MOSES SAYRE'S EXECUTORS, appellants,

v.

JAMES R. SAYRE, JR., et al., respondents.

On appeal from a decree of the chancellor, whose opinion is reported in *Sayre v. Sayre*, 5 Stew. Eq. 61.

Messrs. A. Q. Keasbey & Sons, for appellants.

Mr. Frederick Frelinghuysen, for respondents.

PER CURIAM.

This decree affirmed for the reasons given by the chancellor.

For affirmance—THE CHIEF-JUSTICE, DEPUE, KNAPP, PARKER, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, KIRK, PATERSON, WHITAKER—13.

For reversal—DIXON, MAGIE—2.

INDEX.

A.

Agent.

An agent cannot exact from his principal any advantage growing out of a contract made by the agent in his principal's name, unless the principal has expressly authorized or ratified it, with knowledge that such advantage would accrue. *Vreeland v. Van Blarcom*,

530

See EXECUTORS, 6.

Amendments.

Where special relief is sought in a bill, and not specifically mentioned in the prayer, and the proofs make a strong case for the granting of such relief, equity will order an amendment of the prayer, and make a decree in accordance with such amendment.

• *New York Fire Insurance Co. v. Tooker*,

408

Appeal.

1. An appeal will not lie from an order of the chancellor making an allowance to commissioners for their services and expenses in having maps and surveys made, where the ground of appeal is that the allowance was unreasonable and excessive, and the matter has been heard in the court of chancery on petition and affidavits annexed thereto, without any counter affidavits and without application for a hearing on depositions. *Cronkright v. Haulenbeck*,

279

2. An appeal from a final decree brings before the appellate court all interlocutory orders or decrees involving the merits. *Clair v. Terhune*,

336

3. On appeal from the final decree, the appellate court will decide whether a decree of reference, prescribing the limits of the accounting, be right. But items clearly within the limits of the reference, not allowed by the master, where exceptions to the report have not been filed, will not be considered. *Id.*,

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4. The statute which provides for an issue for the trial of the question of the validity of a will, by the circuit court, does not take away the right of appeal secured by the constitution; and on such appeal the issue is to be retried in the prerogative court, as fully as if the decree appealed from were based on the finding of the orphans court itself. *Kitchell v. Beach*,

446

Appeal—Continued.

5. An order which is founded on a denial of the equitable right of the complainant to prosecute his suit, and imposes a condition upon him, and arrests his proceeding for an indefinite time, is the subject of an appeal. *Davis v. Flagg*, 496

C.**Cases Criticised.**

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Affirmed, *American Dock Co. v. Trustees &c.*, 183
- Bigelow v. New York Central Ins. Co.*, 22 N. Y. 402.
Overruled, *Jersey City Ins. Co. v. Nichol*, 301
- Carpenter v. Providence Ins. Co.*, 16 Pet. 495.
Overruled, *Jersey City Ins. Co. v. Nichol*, 301
- Elizabethtown Sav. Inst. v. Gerber*, 7 Stew. Eq. 130.
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- Gaston's Trust*, 8 Stew. Eq. 60.
Affirmed, *Veghte v. Steele*, 348
- Gould v. Gould*, 8 Stew. Eq. 37.
Affirmed, *Gould v. Gould*, 562
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- Loss v. Obry*, 7 C. E. Gr. 52.
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- New York &c. R. R. v. Stanley*, 7 Stew. Eq. 55.
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- Platt v. Bright*, 4 Stew. Eq. 81.
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- Roe v. Moore*, 8 Stew. Eq. 90.
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Charity.

A charitable gift to a hospital will be sustained notwithstanding a misnomer of the corporation, and it will hold the gift on the conditions and trusts named by the donor. <i>Lanning v. Sisters of St. Francis</i> ,	392
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Chattel Mortgage.

See MORTGAGE, 1.

Comity.

1. An order made by force of the New York code, upon a debtor of a defendant, on a judgment to pay the debt due to the plaintiff in the judgment, in part satisfaction thereof, will be held to be conclusively binding in this state. *Elizabethtown Savings Institution v. Gerber*, 153
 2. And if the debt so ordered to be paid were in the custody of the court of chancery, such foreign order of judgment would lay in itself a ground for a bill seeking such money. *Id.*, 153
 3. But where such moneys were in the hands of a corporation of this state, and it appeared that such corporation was not cited in the proceeding in New York, and did not appear therein, such foreign order requiring it to pay said moneys, such order was void. *Id.*, 153
 4. *Query*—Whether moneys can be attached in a foreign state in the hands of a litigant in the courts of this state, when the time for pleading, on the part of such litigant, has expired. *Id.*, 153
- See PARTIES, 2.

Contract.

The owners of lands over which the Montclair Railway Company proposed to construct its railroad, entered into an agreement for the occupation and use of their lands, in consideration of the company building a depot on the premises and certain arrangements for the running of trains. The company took possession and built its railroad in 1870, but neglected to build the

Contract—Continued.

depot. It became insolvent, and its property and franchises were sold under foreclosure in 1875. In 1878 the same property and franchises were again sold to purchasers, who organized under the general railroad law in the corporate name of the New York and Greenwood Lake Railway Company. On an ejectment against the latter company, brought by the land-owners to recover possession of the land, a bill was filed to stay the prosecution of the suit.—*Held*,

(1) That the complainants' right to equitable relief arose out of the equities subsisting between the Montclair Railway Company and the land-owners—possession taken by that company under an agreement which had not been carried out, and the expenditure of money on the faith of that agreement in the construction of a railroad over the premises.

(2) That the complainant had only a right to equitable protection against the legal title of the plaintiffs in the ejectment suit, to the same extent and upon the same terms as the Montclair Railway Company would have been entitled to such protection.

(3) That the terms on which the complainant is entitled to equitable relief are, that the complainant shall pay the value of the land and damages as of the time when the Montclair Railway Company took possession, and interest on such valuation from that time.

(4) Paying interest on the value of the land and the damages from the time of the original entry is not paying the debt of the defunct corporation; it is only making the recompense which the land-owners are entitled to have on the enforcement of an equity against them.

(5) The expense of making and maintaining additional fences made necessary by the construction of a railroad through the premises, should be included in the damages to be awarded for the lands, where the expense thereof falls upon the land-owner.

New York and Greenwood Lake Railway Co. v. Stanley,

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See RECEIVER, 1, 2; SOVEREIGNTY, 8; SPECIFIC PERFORMANCE, 3, 4.

Corporation.

1. An insolvent corporation had been in the hands of this court since 1876, and its railroad operated through a receiver appointed by the chancellor. The injunction restraining the managers of the corporation from interfering with or exercising the franchises of the company was modified in order to allow the stockholders to hold an election for directors, and thereunder certain stockholders made a written application to the existing board of directors to order an election of new directors, at the time designated by the by-laws for holding such annual election. This the directors refused to do. On application to the chancellor—*Held*, that he might order an election of directors by the present stockholders, and so ordered; such election to conform as nearly as possible

Corporation—Continued.

- to the requirements of the by-laws of the company. *Lehigh Coal and Navigation Co. v. Central Railroad Co. of New Jersey*, 349
2. Subscriptions to capital stock are a trust fund for the payment of the debts of the corporation. The trust is created for the benefit of creditors as a class. All the creditors of the corporation have a common interest in this fund, and are entitled to share in it ratably. *Wetherbee v. Baker*, 501
 3. A creditor, having exhausted his remedy against the corporation by judgment, execution and a return of *nulla bona*, may file a bill against its stockholders to compel the payment of unpaid subscriptions to the capital stock. *Id.*, 501
 4. The fifth section of the act concerning corporations (*Rev. p. 178*) provides that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." *Id.*, 501
 5. In a suit by a judgment creditor against stockholders of a corporation to compel payment of their unpaid subscriptions to the capital stock—*Held*,
 - (1) That such a suit can only be prosecuted by a creditor suing in behalf of all the creditors of the corporation.
 - (2) That the corporation is a necessary party to the suit.
 - (3) That all the property and assets of the corporation must be brought into the suit and put in the course of administration. *Id.*, 501
 6. Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corporation, and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of acts or resolutions entered on its minutes, so as to raise up against them an equitable estoppel arising from a consent to the proceedings. *Id.*, 501
 7. The capital stock subscribed is a substitute for the personal liability of partners in ordinary copartnerships, and creditors are entitled to a *bona fide* exercise of the compulsory powers of the corporation to compel subscribers to pay in their subscriptions. *Id.*, 501
 8. The officers of a corporation are the trustees of the subscriptions to its stock, and hold them as a trust fund for creditors; and the trust cannot be defeated by any simulated payment of the stock subscriptions, or by any device short of actual payment in good faith. *Id.*, 501
 9. Transactions under statutes authorizing corporations to purchase

Corporation—Continued.

property and issue stock in payment for it, or to accept property in payment of subscriptions to the capital stock, are upheld only where the agreement to purchase property and pay for it in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation. *Id.*, 501

10. Courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors, only where payment has been made in money, or what may fairly be considered as money's worth. *Id.*, 501

11. The third section of the land improvement act (*Rev. p. 568*) enacts that payment of the capital stock of corporations organized under the act, shall be made either in money or in land—the land to be appraised by the board of directors and taken at such value.—*Held*,

(1) That this section does not supersede the obligation of subscribers to pay their subscriptions, as they appear in the certificate of organization—it simply provides the manner in which payment shall be made; and in a suit by creditors against a stockholder, to compel him to pay his subscription, the inquiry is, has he paid in money or money's worth?

(2) That the directors, in the appraisement of land taken in payment of subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. *Id.*, 501

12. Five persons agreed for the purchase of a tract of land, and organized themselves into a corporation, under the land improvement act. In the certificate of incorporation the capital was fixed at \$100,000, and these persons subscribed for all the capital stock, and became the directors of the company. The consideration of the purchase was \$50,000; the deed was made directly to the corporation, and it gave its obligations for the whole purchase-money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of fifty per cent. on the subscriptions to the capital stock. The lands were not worth more than the original purchase-money, and the company acquired no other property, real or personal. In a suit brought by a creditor of the corporation against the subscribers to the capital stock, to compel them to pay their subscriptions, in order to satisfy debts of the corporation—*Held*, that as against creditors of the corporation the allowance of a credit of fifty per cent. on the subscriptions of the stockholders was invalid, and that the stockholders were liable for the whole amount of their subscriptions to the capital stock, as they appeared in the certificate of organization. *Id.*, 501

See COMITY, 3; MORTGAGE, 3, 5; SPECIFIC PERFORMANCE, 1.

Costs.

If a bill is demurrable and allowed by the defendant to proceed to a hearing, and then dismissed for want of equity, the dismissal will be without costs. *Dawes v. Taylor*,

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See SHERIFF; SURROGATE.

D.**Deed.**

See INJUNCTION, 2; PARTY-WALL; TRUSTS, 5.

Descents.

A great uncle and first cousin, both being related to the person last seized in equal degree, viz., the fourth, and being his nearest surviving kindred, are entitled to succeed to his lands as tenants in common in equal parts, under the sixth section of the statute of descents. *Smith v. Gaines*,

65

Divorce.

1. A separation sought by a wife because her husband is intemperate and improvident, is not an obstinate and willful desertion on his part, within the meaning of the divorce act. *Plimley v. Plimley*,

18

2. A husband was intemperate and idle, and his wife told him that if he was going to continue as he had done, they "might as well each do for themselves," whereupon he left her. They separated amicably; she attending him to the railroad station when he left. She swears that she has never seen or heard from him since then (in 1878), although he appears to have written two letters to their daughter, who lived with her mother, the first letter being written about a year after he went away. The wife says that, by her expression, she meant, "that either he must support his family, or she and he must each support himself or herself."—*Held*, that the separation does not amount to desertion to justify a divorce. *Johnson v. Johnson*,

20

3. The parties to this suit were married in November, 1875. In March, 1876, the husband, being angry with his wife, who upbraided him for being intoxicated when he came home, moved all of his furniture out of the house where they were then living together, and left her there alone. She then went to her father's house, and has ever since been supported by her parents, or by her own labor. Her husband contributed nothing towards her maintenance, or that of her infant, during its lifetime, and had no communication whatever with her, although they both continued to live in the same town after March, 1876. *Held*, that the wife was entitled to a divorce for desertion. *Williams v. Williams*,

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See HUSBAND AND WIFE, 2.

E.

Estoppel.

See MUNICIPAL CORPORATION, 5; PARTIES, 2; SOVEREIGNTY, 8, 9.

Evidence.

1. In a suit for an account by a surviving partner against the executor of his deceased copartner, the survivor is competent to prove that the decedent applied partnership funds to his own use, but statements or personal transactions of the survivor with the decedent must be excluded. *Besson v. Cox*, 87
 2. Where an executor allowed a claim for farm produce furnished the testatrix, and the claimant swears positively that he furnished the produce and that no part of the price has ever been paid, his oath is not overcome by that of one of the next of kin, the exceptant, who swears that the claimant lived with the testatrix, and had no place whereon he could raise the produce. *Middleton's Executors v. Middleton*, 141
 3. Where, upon exceptions being filed to the account of an executor, on the ground that he has not charged himself with certain shares of stock, the executor claims the stock by virtue of a gift from the deceased, he is not a competent witness under the act of 1880, or any other act, to prove a delivery to him of the stock by, and the alleged declarations of, the deceased at the time of the delivery. *Smith v. Burnet*, 314
 4. Receipts, though *prima facie* evidence of the discharge of an obligation, may always be explained and contradicted by other evidence. *Swain v. Frazier*, 326
- See CORPORATION, 6; HUSBAND AND WIFE, 1; MORTGAGE, 4; PRACTICE, 6; STATUTE, 1; WILLS, 2, 7.

Executors and Administrators.

1. A claim for services rendered by a detective employed by the counsel of the principal legatee, such services being valuable in establishing the will, may be allowed and paid out of the estate. *Lewis's Case*, 99
2. An executor gave his testator, during the latter's lifetime, a mortgage for moneys loaned, but, owing to the testator's illiteracy, the mortgage was never registered.—*Held*, that the residuary legatees might require the executor to give security because he neglected to have the mortgage registered after it came into his hands as part of the estate, and also because he claimed certain credits for payments thereon, which appeared to be false. *Bird v. Wiggins*, 111
3. An administrator converted dividend-paying bank stock of the estate into money, and with it paid off a mortgage on lands in which he had an interest as heir of the intestate. On exceptions to his account, credit for that payment was disallowed.—*Held*, that he was chargeable with interest at the legal rate on that

Executors and Administrators—Continued.

amount from the date of the payment, including the time during which litigation on the exceptions continued. *Mount v. Van Ness*,

113

4. The orphans court has no power to allow one executor the amount of a debt which he insists is due him from the testator's estate, or of a fee which he claims to have paid counsel for advice in regard to the estate, if his co-executors dispute their payment. *Middleton v. Middleton*,

115

5. An administratrix assigned to her counsel certain stock of the estate, and he immediately transferred it to her individually. On a bill in chancery against her by the next of kin, the transaction was declared fraudulent, and the administratrix was ordered to hold the stock and account in chancery for it and its accumulations, and was enjoined from disposing of it.—*Held*, that, in settling her account, she was, under the circumstances, entitled to an allowance for the depreciation of the stock pending the injunction. *Greiner v. Greiner*,

134

6. A testator gave to his wife, during her widowhood, a room in his dwelling-house and all the furniture she might require, and directed that his executors (his sons Stephen and Jephthah) should furnish her with everything necessary for her comfort during her natural life, and that in case they should refuse or neglect to do so, she should have "the privilege of choosing a person to act for her." Testator died in 1872, and his widow has continued to possess and live on his farm since then. Both of the sons, the executors, are dead, and complainant has been appointed administrator *cum test. an. de bonis non* of the testator. To a bill filed by him in this capacity, and on an allegation that the widow recently chose him to act for her under the will, averring that the means of support of the widow were insufficient, and praying that complainant might be authorized to sell some standing timber therefor, a demurrer filed by the widow and the administratrix of the surviving son and executor, was allowed, on the ground that complainant, as administrator with the will annexed, is not charged with the duty of securing for the widow of the testator the provision made for her by the will, and cannot sustain a suit brought in his name as her agent, for that purpose.—*Held* further, however, that the demurrer, being general, must be overruled, because complainant is entitled to an account (prayed by the bill) of the estate of his testator which remained in the hands of Stephen, the surviving executor, as against Stephen's administratrix; but, under the two hundred and tenth rule, the first-mentioned matter was struck out of the bill. *Lindsley v. Personette*,

355

7. An executor invested funds of the estate in a second mortgage on lands in this state and in an unsecured promissory note, both of

Executors and Administrators—Continued.

which proved to be worthless, and a total loss to the estate. The executor not only admitted his liability to the estate for these investments, but repeatedly promised to indemnify the estate therefor.—*Held*, in a suit by his co-executor against his executors and legatees, that the latter were liable for the amount of those investments. *Crane v. Howell*,

374

8. In a case where the commissions of brokers for selling and buying stocks and securities of the estate had been paid out of the estate; and the time covered by the account was not over a year; and the assets appear to have been readily convertible, and there was no matter of especial difficulty in the settlement of the estate, an allowance to the executors of a commission of five per cent. on the estate (\$517,000) was held to be excessive, and reduced to three per cent. thereon. The fact that the executors were thereafter to raise out of the real estate and pay over to a designated trustee a large sum of money, was held not to warrant an allowance in respect of such service, since their compensation depended upon their discharging the duty, and could not justly be paid until after the duty had been performed. *Pomeroy v. Mills*,

442

9. A testator directed his executors to invest certain funds in "first-class, interest-paying securities," and to pay the interest derived therefrom semi-annually to certain designated beneficiaries for life, and to pay the principal to others after the termination of the life estate of those first named. The funds at the testator's death were left by him invested in second mortgage railroad bonds, railroad stocks and bank stocks.—*Held*, that the orphans court had no power, under the one hundred and fifteenth section of the orphans court act (*Rev. p. 777*), on the application of the executors, to order that the investments of the funds be continued in the securities left by the testator, because such order is not within the object of that section of the act. The section does not apply to moneys which the fiduciaries therein mentioned are required to invest, but such as they are required to hold. *Woodruff v. Ward*,

467

10. An administratrix of her husband's estate retained out of the estate money due her from her husband for money lent by her out of her separate estate to him, to be repaid with interest, and also money received by him as a deposit for her benefit out of her separate property. She also delivered to the surviving executor of an estate of which her husband had been an executor certain securities found in her husband's safe after his death, and proved to be the property of that estate.—*Held*, that her action in both matters was lawful. *Personette v. Personette*,

472

11. Where an administrator, in pursuance of a family arrangement for the benefit of the widow and children of the deceased, dis-

Executors and Administrators—Continued.

posed of the property in such manner in connection with a lease on which the estate was liable, as to realize more than could have been realized by disposing of it in the usual way, taking into account the loss which the estate, but for the arrangement (part of which was the assumption of the lease), must have met on the lease—*Held*, that he was not liable under the circumstances, on certain notes taken as part of the purchase-money of the property, and which he had failed to collect. *Green v. Grocock*,

474

See EVIDENCE, 1, 2, 3; GIFT; PARTIES, 2; PLEADING, 2; TRUSTS, 4.

F.**Fees.**

See COSTS; EXECUTORS, 8; PARTITION, 1; SHERIFF; SURROGATE.

Fraudulent Conveyances.

1. The complainant was a judgment creditor of the defendant, and thereunder levied on and purchased at the sheriff's sale real estate belonging to the debtor. There were two prior mortgages on the premises, which were afterwards foreclosed, complainant being made a party, and the premises bought by the executors of defendant's father. One of the mortgages was for \$2,800, and was given by the defendant to the executors. The defendant, under her father's will, was entitled to the use of the residue of the estate, and in a certain contingency, to the residue absolutely. On a bill by the complainant against the defendant, the executors and others, to set aside as fraudulent, and intended to deprive complainant of his debt, the mortgage given by the defendant to his father's executors for moneys due the estate—*Held*, that as the claims of the estate against the defendant were shown by the evidence to be just and due, and antedated that of complainant, the fact that the defendant had abandoned a questionable claim against the estate, at the suggestion of the executor, by whom it was opposed, presented no ground of relief to complainant. *Menzel v. Ackerman*,

34

2. The transfer of all a debtor's property pending a suit against him; the taking of an absolute deed as security for money owing by the debtor, and looseness or incorrectness in stating the consideration of the conveyance, or in determining the value of the property conveyed, are indications of fraud. *Moore v. Roe*,

90

3. In 1866, one M. died seized of a farm of about two hundred acres, leaving a widow and several children. One son, Charles, purchased the interests of his brothers and sisters in the farm, and agreed with one of his brothers, William, that William should remain on and take charge of the farm, and maintain their mother and unmarried sister thereon, from the products of the

Fraudulent Conveyances—Continued.

farm, promising to compensate William for his services, and to convey the farm to him whenever he wished, or could pay for it. The mother remained until her death in 1872, and the sister still resides there, and Charles has spent one or two months of every summer on the farm, with his own family. In March, 1877, he conveyed the farm to William, together with the implements and stock thereon, for a consideration, named in the deed, of \$12,000, for which sum William gave a mortgage on the farm to Charles. In June, 1877, the amount of this mortgage was reduced by crediting thereon a mortgage of \$2,000, which Charles had given to William in 1866 for his interest in the farm, by \$2,000 which Charles allowed William for his services on the farm, and by reducing the valuation of the farm from \$12,000 to \$10,000—leaving the sum secured by the mortgage, \$6,000. In April, 1877, the complainant began a suit in Pennsylvania on Charles's note, in which he recovered a judgment for \$18,000. Charles was insolvent when the farm was transferred, but this was unknown to William. *Held*, that the conveyance was good as against the complainant, and the adequacy and fairness of the consideration, and the *bona fides* of William having been established, the land cannot be deemed as a mere security for the original debt, besides the mortgage for \$6,000 due from Charles to William, and consequently be charged therewith, but the transfer being sustained, the bill to set it aside as fraudulent must be dismissed. *Muirheid v. Smith*, 303

4. To set aside and completely annul a deed made to a grantee who is a creditor, or who has given a consideration for the conveyance, which shall carry with it a forfeiture of all the grantee's rights, on the ground that the conveyance was made in fraud of creditors, it is necessary that it should appear that the grantee had knowledge of, or participated in the fraudulent intent of the grantor.—DEPUE, J. *Id.*, 303
5. Where a deed is sought to be set aside as voluntary and fraudulent, as against creditors, and the evidence is not sufficient to induce the court to avoid the deed absolutely on the ground of fraud, but is sufficient to excite a well-grounded suspicion as to the adequacy of the consideration and the fairness of the transaction, the court will permit the conveyance to stand only as security for the consideration actually paid.—DEPUE, J. *Id.*, 303
6. On bill to set aside a sale as fraudulent, it is not enough to show that the vendor intended to defraud his creditors, but the further fact must be shown that the vendee was either an active or passive participant in the fraud of the vendor. *New York Fire Insurance Co. v. Tooker*, 408
7. To constitute him such participant, it is not necessary to show that he had direct or positive knowledge of the fraudulent pur-

Fraudulent Conveyances—Continued.

pose of the vendor, but it will be sufficient to show that he had notice of such facts and circumstances as would naturally lead up to a strong inference of fraud. *Id.*,

408

8. In order to set aside, as fraudulent against creditors, a conveyance to one creditor, he must have participated in or have been cognizant of the grantor's unlawful motives, when he accepted the conveyance. *Roe v. Moore*,

526

G.**Gift.**

Upon the hearing, a witness swore that she heard the deceased say that he had given the stock to the executor, and the executor himself swore that he had had possession of the stock since January 7th, 1875. It appeared that the deceased gave to the executor, on January 7th, a power of attorney to receive and assign scrip or dividends; that the executor drew the dividends due after the death of the deceased, and paid out of the amount interest upon a mortgage due by the deceased, and that he afterwards assigned the scrip as executor.—*Held*, that the executor failed in showing that the stock passed to him by gift. *Smith v. Burnet*,

314

See EVIDENCE, 3.

Guaranty.

The condition of a bond, accompanying a mortgage, was, that one F. should remit to complainant, "forthwith, immediately on receipt of the same," the proceeds of all sales of certain enumerated articles, less F.'s commissions, and that on F.'s failure so to do, the mortgagors should become liable therefor. Complainant accepted F.'s notes and post-dated check for considerable amounts for the proceeds of such sales, instead of cash remittances.—*Held*, that the mortgagors, being merely guarantors, were discharged as to the amounts of the notes and check by the extension of the time of payment by the complainant without their assent, and without reserving his rights as against them. *Haskell v. Burdette*,

31

Guardian and Ward.

1. A ward, whose estate was small, lived with his father, who was the guardian. The father never, during his lifetime, made any charge against the ward for his maintenance.—*Held*, that sureties of the guardian cannot obtain an allowance therefor in a suit on their bond. *Walling's Case*,
2. A guardian was appointed in 1860; his youngest ward came of age in 1871, and the guardian became insolvent in 1872 or 1873.—*Held*, that the ward's omission to sue the surety or his administrator, until 1880, did not prevent his recovery. *Id.*,

105

105

See SURETY, 3.

H.

Husband and Wife.

1. Where lands are bought and paid for by a husband, but the title thereto put in the name of his wife, the ordinary presumption of a settlement, which in this case was fully corroborated by his actions and declarations at the time of the purchase and transfer, cannot be rebutted by his subsequent declarations, nor by his present declarations of his intention then. *Lister v. Lister*, 49
2. Nor will equity aid him on account of the subsequent adultery of the wife, and his consequent divorce from her therefor. *Id.*, 49
3. Nor will any possibility of curtesy in the property entitle him to relief. *Id.*, 49
4. A widow may reclaim from her husband's estate moneys of her separate estate which she loaned him during his lifetime, and which he applied to the payment of a mortgage on lands, the title to which stood in the names of her and her husband, as husband and wife. *Greiner v. Greiner*, 134
5. The defendant owned a lot of land, and his wife an adjoining lot. They gave a bond and mortgage covering both lots, but the wife was only a surety therein. With the money obtained from the mortgage the husband finished a row of four houses, which were being built on part of the premises when the mortgage was given; one of these houses stood entirely on the wife's lot. On foreclosure of the mortgage—*Held*, that while the wife's right as surety must be recognized and protected, yet, as to an execution creditor of the husband, she was a principal so far as any of the money borrowed on the mortgage has been applied to the erection of the house on her lot; and a reference was ordered to ascertain the amount. *McFillen v. Hoffman*, 364

See DIVORCE; EXECUTORS, 10; PLEADING, 1.

I

Injunction.

1. A preliminary injunction granted to prevent the alleged violation of a building covenant in a deed will be continued, in a case where the proper construction of such covenant cannot be judicially determined until the final hearing. *Pope v. Bell*, 1
2. Complainant owned a lot with a building thereon, seventy-five feet in depth, with a cellar beneath, a store in the first story, and a large room, known as "Pope's Hall," in the second story. Complainant's wife owned the adjoining lot, which was on the corner of another street, with a building thereon, running back fifty feet along complainant's building. In that part of complainant's building extending beyond that of his wife, there were two windows in the wall of the cellar, two in the store and two in the large room or hall. Complainant and his wife conveyed her lot

Injunction—Continued.

and building to the defendant, by a deed reserving a strip of land three feet wide across the rear of the lot so conveyed, to the street, for the purpose of carrying off the water and sewages from the said hall; and containing a covenant "that nothing shall be built or erected on the said lot to obstruct the light of the said Pope's Hall." There was a space of twenty-five feet between the building on the front of defendant's lot and the building on the rear of it; and on that space defendant began to erect another building, sixteen feet high, covering the greater part of such space. An application to dissolve, on bill and answer, a preliminary injunction restraining defendant from erecting such building, on the ground that defendant's covenant only prohibited his obstructing the light of the windows in the hall itself (which defendant claims his new building will not obstruct), and not those in the store and cellar, was refused. *Id.*, 1

3. A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain. *Cape May and Schellinger's Landing Railroad Co. v. Johnson*, 422
4. It is an established rule of the court of chancery that it is not open to any party to question the orders of the court, or any process issued under its authority, by disobedience; and even where the order is improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. *Id.*, 422
5. An attempt to justify such disobedience by showing that the act was committed after consultation with counsel, and upon his advice to disregard the notice, will afford the defendants neither justification nor palliation. *Id.*, 422
6. A wrong which is a mere technical invasion of complainant's rights, and does not threaten serious injury, will not lay a ground for a preliminary injunction. *Wakeman v. New York, Lake Erie and Western Railroad Co.*, 496

See EXECUTORS, 5; PRACTICE, 7; SOVEREIGNTY, 6, 12.

Insurance.

1. Where there are two policies of fire insurance on the same property, each containing the condition that if the assured shall have, or shall thereafter make, any other insurance on the property, without the consent of the company written thereon, then the policy shall be void, the second policy, without such consent, does not invalidate the first, for it never effected an insurance. *Jersey City Insurance Company v. Nichol*, 291
2. Although there is a second policy, there is no fraud in the state-

Insurance—Continued.

- ment, in proof of loss, that there is no other insurance, if the second policy was never effected. *Id.*, 291
3. A statement of the value of the house burned, in proving the loss, without actual fraud appearing, is but an estimate and opinion, which, if excessive, will not invalidate the insurance for false swearing. *Id.*, 291
4. A claim for loss under the second policy, after the fire, made by the insured, has no effect in reviving that policy, if the insurer does not assent thereto, or waive the forfeiture. *Id.*, 291
5. Where an apportionment of the loss is provided for in a policy, this can only be construed to apply to other insurance valid in its inception. *Id.*, 291

Interest.

See CONTRACT, 4; EXECUTORS, 3; TRUSTS, 3.

J.**Jurisdiction.**

1. Where no special ground of equitable jurisdiction is alleged, a bill to restrain a sheriff from selling, under execution, lands claimed to belong to a person other than the defendant in execution, cannot be maintained. *Dawes v. Taylor*, 40
2. Where the court of errors and appeals has rendered a decree after hearing on the merits, and the decree has been entered in the minutes in accordance with the views of the court, and the record has been regularly remitted to the court below, it has no further jurisdiction of the case, and therefore will not entertain an application for leave to file a bill of review. Such application is to be made to the court of chancery. *Putnam v. Clark*, 145
- See APPEAL, 1, 4, 5; CORPORATIONS, 1, 3; MUNICIPAL CORPORATION, 1-3; SOVEREIGNTY, 6, 7; SURETY, 1.

L.**Landlord and Tenant.**

- Where two of the next of kin are requested by one of the executors to remain in one of testatrix's houses to take care of it, and they, without agreeing to pay rent therefor, continue in possession until notified to quit, they are not liable for rent of the premises. *Middleton v. Middleton*, 141
- See SPECIFIC PERFORMANCE, 7, 8.

Limitation of Actions.

1. The actions of debt limited by the statute of limitations are those only growing out of contract, or such as are given by statute for the enforcement of penalties. *Dickinson v. Trenton*, 416
2. Where an action of debt is given for the enforcement of an assess-

Limitation of Actions—Continued.

ment made for special and peculiar benefits, and the assessment is made a lien on the land benefited, a failure to sue for six years after the right of action accrues, neither bars the action nor extinguishes the lien, unless the statute authorizing the assessment so provides. *Id.*,

416

See GUARDIAN, 2; PARTIES, 1.

Lunatics.

An inquisition finding the alleged lunatic "of unsound mind, so that he is not capable of the government of his lands, tenements, goods and chattels," is sufficient, though it does not state that he is also incapable of governing himself. *James's Case*,

58

M.**Maxims.**

Stat pro ratione voluntas,

128

Mistake.

1. The record of a judgment at law imports absolute verity. The court of chancery cannot examine or determine whether it expresses the judicial determination of the court in which it was pronounced, or whether it was entered up, by mistake of the clerk, different from what it ought to have been or was intended to be. *Cutter v. Kline*,

534

2. A judgment of the circuit court, upon proceedings to enforce a lien claim, may be general or special, or both. If, when the proceedings are against the same person as builder and owner, the record shows a general judgment only, the court of chancery, in the absence of fraud or imposition, cannot directly or indirectly impose the debt involved therein as a lien on the lands in question, on the ground that it ought to have been recorded as a special as well as a general judgment, and was erroneously recorded by mistake of the clerk. *Id.*,

534

See SETTING ASIDE SALES.

Mortgage.

1. Simply affirming under oath that the consideration of a chattel mortgage is the sum for which it is given, without disclosing how the debt on which it is founded arose or was incurred, is neither a literal nor a substantial compliance with the statute requiring the mortgagee to file an affidavit showing the consideration of his mortgage. *Ehler v. Turner*,

68

2. The giving of a bond as collateral security to a subsisting bond and mortgage, does not, *per se*, and in the absence of any ancillary agreement, operate as a suspension of the right to prosecute such bond and mortgage. *Firemen's Insurance Co. v. Wilkinson*,

160

Mortgage—Continued.

3. A director of a building association, who gave to the association an ordinary bond and mortgage for a loan, cannot set up as a defence to its foreclosure, that by a secret parol agreement between him and the other directors, the loan was to be and had been repaid and the mortgage satisfied by his shares of stock in the association having been fully paid up after the loan was made. *Pangborn v. Citizens Building Association*, 341
4. A mortgage absolute on its face, assigned by the mortgagee to the holder as collateral security, may be shown, on foreclosure, to have been originally given as a collateral mortgage, but this defence not being responsive to the bill, must be established by other evidence than the answer on oath of the mortgagor. In this case, the bill prayed answer on oath. *Dickerson v. Wenman*, 368
5. In 1872, certain lands covered by mortgages were condemned for the use of a railroad, without the mortgagees having been made parties thereto, and the entire amount of the award (\$6,500) was paid to the mortgagor, who was then in possession. The railroad company afterwards became insolvent, and a receiver therefor was appointed by this court. When the mortgages were foreclosed, the receiver intervened in order that the decree of sale might provide for exhausting the other lands covered by the mortgages before resorting to those condemned, and it was so ordered. At the sale it was found necessary, in order to satisfy the mortgagees, to sell also the lands condemned, and they were bought by the mortgagees for \$5,000. The receiver then instituted proceedings to condemn the lands anew, and on petition by the mortgagees to restrain such proceedings, and for the payment to them of the amount of the award of 1872, by the receiver—*Held*,
 - (1) That the mortgagees had, by purchasing the lands, defeated the title of the railroad company thereto, and the fact that they had been the mortgagees of the premises gave them, after their foreclosure purchase, no other or better standing than any other purchaser, with reference to the condemnation proceedings and award of 1872.
 - (2) That as the affairs of the company were now in the hands of the court for administration and management, and the court was not satisfied that the course proposed by the receiver was the best or most judicious one for obtaining title to the premises, the receiver should be directed to report, for the information of the court, his reasons for proceeding with a new condemnation. *Lehigh Coal and Navigation Co. v. Central Railroad Co.*, 379
6. A second encumbrancer cannot compel the holder of a first lien to redeem the second, or be foreclosed. *Dickinson v. City of Trenton*, 416
7. If the money secured by a mortgage is justly due, the motives of

Mortgage—Continued.

a person in acquiring an assignment of it, and in foreclosing it, and his refusal to assign it to a third party, the money due being tendered to him, lay no ground for the staying of such foreclosure suit. *Davis v. Flagg*,

491

8. A covenant to assume a mortgage, for the payment of which the covenantee is personally responsible, binds the covenantor to pay the same. *Vreeland v. Van Blarcom*,

530

See GUARANTY; HUSBAND AND WIFE, 5; SOVEREIGNTY, 2, 5, 13; SURETY, 4.

Municipal Corporation.

1. Equity will not entertain jurisdiction to remove a cloud from the title of a lot, alleged to have been imposed thereon or threatened by a municipal assessment, (1) because complainant paid the assessment without knowledge of its illegality; nor (2) because the city has not repaid the excess over and above complainant's share of the improvement, as the city agreed; nor (3) because there was a misrepresentation by the city that the assessment, when made, was just and equitable. *Watson v. City of Elizabeth*,

345

2. There can ordinarily be no judicial restraint or interference with municipal corporations in the *bona fide* exercise of powers, legislative or discretionary in their nature, provided private rights are not violated. *Cape May and Schellenger's Landing Railroad Co. v. City of Cape May*,

419

3. But when the corporation has fulfilled its legislative functions, and exercised its legislative discretion, and is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene. *Id.*,

419

4. The repeal of an ordinance will not operate to disturb private rights vested under it. *Id.*,

419

5. By a supplement to a city charter it was made the duty of the comptroller to give a certificate as to the liability of real estate for unpaid taxes or assessments, and it was declared that such certificate, in the hands of a *bona fide* purchaser or mortgagee, should relieve and discharge such real estate from any tax or assessment, except such as is therein stated to be unpaid. Two assessments had been laid on a certain lot owned by H.—one for the construction of a sewer, the other for paving the street. H. paid the paving assessment. The complainant, being about to purchase the lot, applied for and obtained a certificate of the comptroller under the act. The certificate set out the paving assessment, and stated that it was paid. The sewer assessment, which was unpaid, was omitted from the certificate. After the complainant took her deed, both assessments were set aside on *certioraris* presented by other parties, and H. sued and recovered

Municipal Corporation—Continued.

back from the city the money he had paid in satisfying the paving assessment.—*Held*, that the complainant being a *bona fide* purchaser, the comptroller's certificate, by force of the supplement above referred to, concluded the city from making new assessments for the construction of the sewer or the paving.

City of Elizabeth v. Shirley,

515

6. *Kahl v. Love*, 8 Vr. 5, distinguished. *Id.*,

515

P.

Parties.

1. The firm of Culver & Hetfield became indebted in 1868, to Comins, who began suit thereon in the supreme court of New York in 1872. Culver died in 1875, pending the suit, which was continued against Hetfield, and a judgment for \$13,000 recovered in March, 1876. An appeal therefrom was taken, and one of the complainants in this suit, Pottle, became surety on the appeal at the request of the heirs and representatives of Culver. The judgment below was affirmed on the appeal. Hetfield paid \$2,000 on the judgment in March, 1881, and Pottle, after suit and judgment against him thereon, \$10,000. During Culver's lifetime, Hetfield & Culver dissolved partnership and divided the assets, leaving Comins's claim unprovided for. Hetfield is insolvent. On demurrer to a bill by Comins and Pottle against Hetfield and the heirs and representatives of Culver—*Held*,

(1) That their claim against Culver's estate was not barred by the statute of limitations, nor lost by laches.

(2) That as Pottle paid part of the debt of Culver & Hetfield to Comins, he thereby became subrogated *pro tanto* to Comins's claim, and was therefore properly joined as a complainant with Comins. *Comins v. Culver*,

94

2. After a bill for the specific performance of a contract had been filed and answered, the defendant, who was a resident of New York, died. By his will, he divided his estate into five equal shares, which were to be held by his four executors and trustees for the equal benefit of his five brothers and sisters, for their lives, with remainder to their respective children. Two of the executors proved the will in New York, but it was not proved in this state. After an order in the cause, the two executors who had proved the will appeared, and, by consent of complainant, were allowed to demur.—*Held*,

(1) That their appearance estopped them from asserting that, being foreign executors, they are not amenable to suit here.

(2) That their co-executors who have not proved the will, are not necessary parties.

(3) That, under the circumstances, the *cestuis que trustent* of the executors, who are the devisees, are not necessary parties. *Newark Savings Institution v. Jones's Exrs.*,

406

See CORPORATION, 5; SOVEREIGNTY, 2, 3.

Partition.

1. In proceedings for partition in equity, the court is authorized in its discretion to make such allowance for the services of the commissioners and their expenses in surveying or otherwise, as may be deemed reasonable on a consideration of the character and extent of the services of the commissioners, and their responsibilities and the expenses reasonably incurred. *Cronkright v. Huulenbeck*, 279
2. Abraham Tuers died intestate in 1850, seized of lands in Hudson county, and leaving six children and two grandchildren, his heirs-at-law. One of the sons, Abraham A. Tuers, left New Jersey in 1854, leaving his wife and children here, and never returned. For twenty years his family neither saw him nor heard from him, but heard that he was dead. In 1874 they ascertained that he was living in California, and one of his sons, William, saw him there. He died in 1877. In 1862, under proceedings in the orphans court of Hudson county, the lands of Abraham Tuers were partitioned, the heirs-at-law of Abraham A. Tuers being made parties thereto. On an allegation of his death intestate, and by sundry mesne conveyances thereunder, the defendants claim parts of the premises. In 1871, Abraham A. Tuers executed a conveyance in California in favor of Hoyt, the complainant, of all his property, real and personal, in New Jersey; and in July, 1874, another, conveying, *inter alia*, all his interest &c. as one of the children and heirs-at-law of his father and mother, or either of them; and in August, 1874, another, conveying, by specific metes and bounds, the lands set off to Abraham A. Tuers's heirs-at-law in the partition of 1862. On a bill for a partition, filed by Hoyt, in chancery, against the defendants as part owners of the premises, and also to set aside the partition of 1862, the defendants, by answer, set up that Abraham A. Tuers was, when he made the alleged conveyances to Hoyt, incompetent to make them, by reason of unsoundness of mind, and that they were obtained by fraud.—*Held*, that the complainant's title being denied, the suit would be stayed, to afford the complainant an opportunity to establish the title at law, and that although evidence was adduced in this cause on the subject of the defence to the deeds, the defendants were nevertheless entitled to try the question of the validity of complainant's title at law. *Hoyt v. Tuers*, 360

Partnership.

See EVIDENCE, 1; PLEADING, 1; SPECIFIC PERFORMANCE, 2.

Party-Wall.

In 1863, two adjoining lots were owned by M., on one of which he had erected a *three-story* brick store-house, whose eaves projected about two feet over the adjoining lot, which was then vacant. In 1863, M. sold and conveyed the vacant lot to F., by this description: "Beginning at the west corner of the brick store-house

Party-Wall—Continued.

of the said M., * * * and running thence north, fifty degrees west, passing close along the northwest side of the said brick store-house, sixty-five feet, to the northeast corner of said store-house; thence" &c., with this right: "Also the right and privilege to the said F. to join to and build into the wall of the brick store-house of the said M., when erecting a building on the lot hereby conveyed, doing no unnecessary damage to the said brick store-house." In 1869, F. erected a *two-story* brick building on his lot, and the same year sold it to H., with the party-wall privilege, and H. sold it to defendant, with the same privilege. M. sold his store-house and lot, in 1872, to S., expressly subject to the party-wall privilege, and through S.'s devisee complainant claims.—*Held*, that defendant was, by the construction of the description in the deed, by the privilege of building a party-wall, contained in the deed, by the measurements necessary to give the lot its full width, as stated in the deed, by the location of F.'s building in 1869, and its peaceable occupation since, and by the absence of irreparable injury to the complainant, entitled to cut off the eaves of complainant's building so far as their projection over his lot interfered with his raising his own building. *Lawrence v. Hough*,

371

Payment.

1. Where receipts, upon a bond secured by mortgage, which purport to be of money, are shown to be of the obligor's unsecured promissory notes, the burden is upon him who claims the benefit of the discharge evidenced by the receipts to show that such notes were accepted upon an agreement that they should operate to satisfy so much of the debt. The acceptance of notes for a pre-existing debt, will not operate to discharge such debt, unless it be agreed that such shall be its effect. *Swain v. Frazier*,
2. Such receipts, if expressed to be in full, would be evidence of an acceptance of the notes in satisfaction, unless explained; but if, in addition, it appear that the obligee was illiterate, of great age, and made her mark to the receipts, at the instance of the obligor, who drew them, and who was a near relative, in whom she would have a peculiar confidence, the person claiming the discharge will be required to establish that the obligee designed and intended thereby to satisfy the debt evidenced by the bond. *Id.*,

326

326

See CORPORATIONS, 10.

Power.

A testator gave to his wife \$14,000, "to be by her used during her natural life at her pleasure, hereby giving her power * * * to appoint the same among my legatees, by will, after her decease, according to her judgment and discretion;" otherwise to his legatees "in proportion to the legacies bequeathed by this my will."—*Held*, that her will bequeathing exactly the \$14,000 among her

Power—Continued.

husband's *surviving* legatees was a good execution of the power, although the will contained no direct reference to or express recital of the power. *Munson v. Berdan*,

376

Pleading.

1. A married woman, at the solicitation of her husband, made a loan of her own money to a partnership composed of her husband and her two sons, taking therefor, at the time of the loan, a written obligation of the firm, payable to her order.—*Held*, that a bill for the repayment of the loan, filed after the death of the husband against the surviving partners, need not allege that the money so loaned was not only borrowed on the credit of the firm, but actually reached the firm, and was expended in its business or for its benefit. *Gould v. Gould*,
- 37
2. On a bill filed by the next of kin against an administrator for a decree of distribution of his intestate's estate, the administrator set up by an answer in the form of a cross-bill, and by way of answer also, that part of the funds constituting the estate had been left by him on deposit in a bank where the intestate had placed it, and the balance deposited by the administrator in a savings bank after the settlement of his final account, both of said banks being then in good standing, and that said banks had, through the embezzlement of a person who was the cashier of one and the treasurer of the other, become insolvent about a month after his final account had been settled, and thereby both deposits had been lost without his negligence; and, further, that a part of the estate was claimed by one of the defendants as his individual property, on an allegation that the intestate held it on a trust for him; further, that another part of the funds of which distribution was claimed, was subject to another trust.—*Held* (without passing on the validity of the defence as to the losses), that the defences were properly pleaded, and a motion to strike them out was denied. *Westervelt v. Ackerson*,
- 43
3. On demurrer to a bill for the specific performance of a contract, whereby defendant, among other things, agreed to convey to a railroad company (whose legitimate successor is the complainant) the right of way for its railroad, one hundred feet in width, over and across his lands, situate &c., and the company, for itself and its successors, covenanted that its railroad should be located and built on the line then already agreed upon by him and the engineer of the company, and designated in the agreement by a reference to a map—*Held*, that an averment, on "information and belief," that the railroad had been constructed on the line mentioned in the agreement, but whether so or not that it was constructed on a line agreed upon by the defendant as satisfactory, and had been operated ever since on said line, without objection or complaint by defendant, "so far as complainant

Pleading—Continued.

knows, and as it believes," lacks certainty and explicitness as to the location of the line of the railroad, and as to the description of the premises claimed to be included in the contract. *New York, Susquehanna and Western Railroad Co. v. Lawton*, 386

See EXECUTORS, 6.

Practice.

1. Defendant was residing with his family, in the house of his mother, in this state, for the summer. His own house, in New York city, was open during the summer, and in charge of a servant. He returned to New York with his family in October.—*Held*, that leaving a copy of a *subpoena ad respondendum* for him at his mother's house, in September, was a good service, it being "his dwelling-house or usual place of abode." *Harrison v. Farrington*, 4
2. The grounds of motion under the two hundred and tenth rule, to strike out an answer in the nature of a cross-bill, need not be stated with greater particularity than would be required in a demurrer, and the grounds of a motion under the rule to strike out parts of an answer need not be stated with more particularity than would be required in exceptions to an answer. *Westervelt v. Ackerson*, 43
3. An order for a commission in lunacy, advised by a vice-chancellor, is the order of the chancellor himself. *James's Case*, 58
4. The proceeding to require an executor to give security in the orphans court, may be by an order to show cause without petition. *Bird v. Wiggins*, 111
5. The verdict of a jury on an issue sent from the orphans court is not conclusive, and the finding as to the capacity of a testator, undue influence &c., may be reviewed in this court. *Rusling v. Rusling*, 120
6. If the evidence taken at the circuit has not been reduced to writing, it can be taken anew here, and other testimony than that produced below admitted. *Id.*, 120
7. Where a judgment has been recovered at law, and the party who recovered it has been enjoined in chancery from proceeding thereon, and a new trial has been ordered, such new trial may, in a proper case, be had in chancery, or, in the discretion of the chancellor, may be had at law, either by an issue out of this court or in the suit at law, and where a new trial in the suit at law is ordered, unless the party who recovered the judgment will consent to such new trial, he will be perpetually enjoined from enforcing his judgment. *Cairo and Fulton Railroad Co. v. Titus*, 384

See AMENDMENTS; COSTS; EXECUTORS, 6; STATUTE.

R

Receiver.

1. The receiver of a railroad corporation has no power, without the authority of the chancellor, to make a contract which will bind the trust. *Lehigh Coal and Navigation Co. v. Central Railroad Company of New Jersey*, 426
2. All contracts made by the receiver of a railroad corporation are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best. *Id.*, 426
See MORTGAGE, 5.

Remainder.

Where land limited over and charged with the support of A for life, includes old and dilapidated buildings, and has never produced enough to furnish a plain support for A, and to pay the taxes and assessments thereon, and the life-tenants are, through poverty, unable to pay such taxes and assessments, the fee in the land may be sold by order of the court, under the statute. *Herring's Case*, 359
See TRUSTS, 5.

S.

Setting Aside Sales.

Where the complainant in a cause promised to notify the petitioner, who was interested in the property, of the time and place of sale, and forgot so to do, in consequence whereof the petitioner did not attend, and the property was sacrificed, such sale was set aside. *Pell v. Vreeland*, 22

Sheriff.

The act regulating the fees of sheriffs on sales under execution, provides that they shall receive on all sums of \$1,000 and less, one per cent.; on all sums over \$1,000 and not exceeding \$3,000, one-half of one per cent.; and on all sums over \$3,000, one-quarter of one per cent.—*Held*, that only one rate can be taken thereunder, whatever the amount of the sale, instead of one per cent. on the first \$1,000; one-half of one per cent. on the amount between \$1,000 and \$3,000, etc., as under the old statute. *Harrison v. Maroney*, 41

Solicitor.

See INJUNCTION, 5.

Sovereignty.

In 1872 the legislature authorized the riparian commissioners, governor and attorney-general to make a deed in the name and under the great seal of the state, to the New Jersey West Line Railroad Company, for any lands of the state under tide water, or that theretofore had been under tide water, which should happen to come within the location of the route or of the stations,

Sovereignty—Continued.

depots or other works of the company or be needed therefor—the boundaries and price to be fixed by the riparian commissioners—the consideration to be paid to the trustees of the school fund. A deed was made accordingly, on the 19th of March, 1872. For part of the consideration (\$82,000) the trustees for the support of the public schools accepted a bond with Asa Packer as surety, secured by mortgage on the premises, as an investment for the benefit of the school fund. The Central Railroad Company was in possession, and had put improvements on part of the premises granted. On the 12th of November, 1874, the riparian commissioners, for \$300,000, made a grant to the Central Railroad Company of several tracts of land under water, excepting therefrom the premises and privileges granted to the West Line company, with a covenant that in case the state had not power to vest title in the West Line company, the state should, for the consideration of \$1, release to the Central Railroad Company the premises granted to the West Line company, free from any encumbrance thereon, by mortgage given to the state. The trustees foreclosed their mortgage, and took a final decree October 22d, 1875. The complainants were not parties to the foreclosure suit. On March 1st, 1879, complainants filed a bill against the West Line company, under the act to quiet titles. (*Rev. p. 1189*). The mortgagees and other encumbrancers and Asa Packer were made defendants in this bill. The bill prayed, among other things, that the trustees be restrained from selling the mortgaged premises under their decree. On appeal from an order of the chancellor denying an injunction to stay a sale under the execution, on the foreclosure decree, pending the suit—*Held*,

(1) That the trustees for the support of public schools are the custodians of the fund set apart for the support of public schools, free by constitutional provision from even the control of the legislature, except in the designation of the mode in which the interest and dividends arising therefrom shall be applied for the support of public schools. For the purposes of the administration of the fund of which they are made custodians and of the rights and remedies upon or against the securities in which it is invested, the trustees are constituted the representatives of the state.

(2) Suits brought by the trustees for the foreclosure of mortgages—investments of the school fund—are subject to the same defences by answer or cross-bill as like suits by other mortgagees; and, as mortgagees, they may be made parties to a bill to quiet the title filed against the mortgagor.

(3) The covenant contained in the grant of the riparian commissioners to the Central Railroad Company, is executory in terms and legal effect, and can only be executed by a bill for

Sovereignty—Continued.

specific performance. To such a bill the state is a necessary party, and the trustees are not its representatives in such a litigation.

(4) The riparian commissioners had no power, by the covenant contained in the grant to the Central Railroad Company in 1874, to release and discharge a mortgage which before that time was an investment of part of the school fund.

(5) A mortgagor who mortgages an embarrassed title, or whose title has subsequently become clouded, cannot, in the absence of fraud, have the foreclosure proceedings stayed on account of an apprehension that the mortgaged premises will not bring full value at a foreclosure sale. His remedy is by redemption.

(6) A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the reason that such a sale will not prejudice the rights of the latter. To warrant resort to the restraining power of the court, the case must present some recognized ground for equitable relief—fraud or irreparable injury.

(7) Courts interfere with great reluctance with the collection of the public revenues. To justify resort to a court of equity to stay the collection of public revenues, the party must make a case strictly within the bounds of equity jurisdiction—an injury otherwise not remediable; and he must seek and prosecute his remedy with promptitude.

(8) The equity of a party who relies on an equitable estoppel to give validity to an inefficient contract is not to have his contract made binding, but to put his adversary to an election between performance of the contract and repudiation of it on equitable terms.

(9) The doctrine of equitable estoppel presupposes that the person against whom it is set up has the volition to accept or reject the proffered benefit, and power to restore the consideration if received.

(10) The trustees for the support of public schools have no control over the state's lands under water; no authority to decide what lands under water shall or shall not be sold; or to fix the price or dictate the terms and conditions on which sales shall be made, nor power to rescind contracts of sale made by the riparian commissioners, which they may deem prejudicial to the school fund. They have not even the capacity to determine from what sources the revenues for the support of public schools shall be derived; no choice as to what money shall or shall not become part of the school fund. Their powers and duties in relation to the school fund are purely executive and ministerial—to invest the fund and appropriate its income annually to the support of public schools.

Sovereignty—Continued.

(11) The trustees are not equitably estopped from collecting their mortgage by the covenant which the riparian commissioners inserted in their grant to the Central Railroad Company, although the state received for the lands granted thereby the sum of \$300,000, which, by the act to increase the school fund of the state (*Rev. p. 1061* § 67), went into and became part of the school fund.

(12) The prayer of the executors of the surety (who have no indemnity for the liability of the surety's estate on the bond except the vendible value of the mortgaged premises and the obligation of a bankrupt corporation), that the mortgaged premises be sold, also presents considerations of pre-eminent weight on an application to a court of equity for a discretionary writ, which is never allowed except on a clear preponderance of equity on the side of the applicant.

(13) The receiver of the West Line company, the mortgagor, by his answer to the bill in this case, affirms the validity of the title of the West Line company, but charges that it would be inequitable to dispose of the title by foreclosure, or otherwise, until its validity as against the complainants' title is determined, and asks, also, that the sale be delayed until it can be made upon an unclouded title. The executors of the surety pray a sale for the purpose of discharging his liability on the bond. A sale of the mortgaged premises at this time will satisfy the mortgage debt.—*Held*, that, under the circumstances, the covenant contained in the grant to the Central Railroad Company would create an equity in the complainants to be allowed to redeem the trustees' mortgage and be subrogated to the right of the mortgagees in the decree so far as to give protection against a sale under it, pending the litigation of the titles of the parties respectively, subject, however, to the equities of the personal representatives of the surety on the bond; but that it could not be made available to the complainants against the indisputable equity of the mortgagees, and of the personal representatives of the surety on the bond, to have the mortgage and the liability of the surety taken out of this litigation and disposed of in the condition of affairs as they were when the mortgage was given and the obligation of the surety was incurred. *American Dock and Improvement Co. v. Trustees of Public Schools*,

181

Specific Performance.

1. Title to lands in this state was derived through a mortgage given to "Joseph D. Beers, president of the North American Trust and Banking Company, his successors and assigns," without words of inheritance. The bill states that the North American Trust and Banking Company was a corporation of the state of New York, and its president, by virtue of the statutes of New York, a corpora-

Specific Performance—Continued.

tion sole of that state, and therefore took an estate in fee in said lands, under the mortgage.—*Held*, that the court would not, on an application for a specific performance of a contract to buy such lands, compel the vendee to complete his purchase, because such title was questionable, and therefore not marketable. *Cornell v. Andrews*,

7

2. At the death of one of two partners, the firm assets consisted of large tracts of land, factories &c., mortgaged for about \$100,000, and personal property estimated to be worth \$120,000. A bill by the representative of the decedent charged that land standing in the name of the surviving partner had been paid for by the decedent's individual means, and also charged the surviving partner with fraud and mismanagement. The surviving partner was appointed receiver of the firm's assets, with full power to settle its affairs under the direction of the court. The survivor was found to be indebted to the firm for about \$75,000, which have not yet been paid. In order to eliminate the real estate from the settlement, the survivor (the complainant) made a written proposition that he would give, or take, for the land, \$30,000, and a release of the mortgages (\$100,000) thereon, and deposit the \$30,000 in court, as part of the firm's assets, to be disposed of by the court, with a further provision that the court should have power to enforce and carry out the contract. The representative (the defendant) agreed to purchase the land on the terms stipulated. On the day fixed for consummating the bargain, the complainant attended, with his deed for the premises duly executed, but the defendant neither tendered the \$30,000 nor produced the releases of the mortgages, but proposed instead thereof, to charge herself with \$30,000 on account of her share of the surplus assets of the firm, and to indemnify the complainant against his liability for the mortgages. This proposition the complainant declined, and the court refused to compel him to accept it; he also rejected defendant's proposition that he should buy the property, instead of defendant, on the same conditions. He then applied to the court to compel the defendant to perform her contract, or that the lands be sold and the defendant held liable to the estate for any loss incurred by her default. The court refused to interfere at that time, reserving the question whether relief might be granted thereafter, and, on appeal, that proceeding was sustained. The personal property of the firm was afterwards sold, by direction of the court, and about \$46,000 realized. Two of the mortgages were subsequently foreclosed, and a decree for \$96,000 thereon obtained. To reduce this decree, \$24,000 of the money derived from the sale of the personalty was ordered by the court to be applied thereto, and, on a foreclosure sale thereafter, the premises brought \$80,000, about enough to satisfy the balance due on the decree. Complainant

Specific Performance—Continued.

files the present bill to charge the defendant with the personal loss which he has sustained by reason of her failure to perform her contract.—*Held*, that while equity may, in the absence of unfairness or imposition, enforce a contract by the representative of a deceased partner to purchase of the surviving partner the lands of the partnership, or may, in case such performance be impossible or impracticable, award compensation, if the complainant's remedy at law be uncertain or inefficacious, and such compensation be indispensable to his relief in equity, yet, if the complainant's action or inaction has hindered or prevented the defendant from performing his contract (as, in this case, complainant's failure to pay his own debt to the firm deprived the defendant of the means of fulfilling her contract), equity, in the exercise of its discretion, will refuse relief. *Ludlum v. Buckingham*,

71

3. The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding upon them, and which, for greater certainty or to answer some requirement of the law, they designed to have expressed in a formal written agreement. *Wharton v. Stoutenburgh*,

266

4. Where, in cases within the statute of frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully-authorized agent, there exist all the materials which the court requires to make a legally-binding contract. *Id.*,

266

5. Where the negotiations have been conducted by parol, or are partly evidenced by writings duly signed and partly rest in parol, and specific performance is sought on the ground of part performance, the terms of the contract must appear clearly, definitely and unequivocally. But it is sufficient that the terms of the contract be made out in a manner satisfactory to the court. The fact that the details of the agreement are controverted by the parties will not deter the court from ascertaining what the terms of it really were and giving effect to the agreement, if the complainant shows himself entitled to a specific performance, by a

Specific Performance—Continued.

- part performance, which shall be referable only to a part execution of the agreement. *Id.*, 266
6. Delivery of possession by a vendor or lessor, accepted and acted upon by the vendee or lessee, is such an act of part performance by the former as to take the contract out of the statute of frauds, and to justify a decree of specific performance against the latter. *Id.*, 266
7. Courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts where the terms and provisions are such that the court could not carry its decree into effect without exercising some personal supervision and oversight over the work to be done, extending over a considerable period of time, such as agreements to repair or build, to construct works, build or carry on railways, mines, and the like. A contract for a lease of mines, to be worked in a specified manner, is not within this principle. The court, in such cases, can grant relief at once by a decree that the lease be executed, leaving the complainant to his legal remedy thereafter for breaches of the covenants contained in it. *Id.*, 266
8. Parties made an agreement for a lease for a term of years—the agreement was not in writing and signed as required by the statute of frauds—the lessee took possession, and then refused to execute a lease. On a bill by the lessor for a specific performance—*Held*, that it was proper that it should be decreed that the lease to be executed should bear date as of the time when possession was taken. *Id.*, 266

See PLEADING, 3; SOVEREIGNTY, 3.

Statute.

A statute permitting a party to be a witness, although the other party sues or is sued in a representative capacity, applies to an action pending at the time of its passage. *Besson v. Cox*, 87

See SHERIFF.

Statutes of Great Britain.

43 Eliz. c. 4,	29
1 Vict. c. 26 § 9,	485
30 and 31 Vict. c. 131,	513

Statutes of New Jersey (Private).

Hospital of St. Francis,	<i>P. L.</i> 1873 p. 928,	399
N. J. West Line R. R.,	<i>P. L.</i> 1870 p. 160,	246
Passaic Valley R. R.,	<i>P. L.</i> 1872 p. 312,	246
Trenton Water Power Co.,	<i>P. L.</i> 1844 p. 85,	289

Statutes of New Jersey (Public).

Chancery,	<i>Rev. p. 118</i> § 76,	162
Corporations,	<i>Rev. p. 178</i> § 5,	512
	<i>Rev. p. 192</i> § 83,	350
	<i>Rev. p. 194,</i>	505
	<i>Rev. p. 196</i> § 106,	353, 428
	<i>P. L. 1877 p. 74,</i>	351
Descents,	<i>Rev. p. 298</i> § 6,	65
Evidence,	<i>P. L. 1880 p. 52,</i>	89
	<i>Rev. p. 378</i> §§ 3, 4,	319
Executors,	<i>Rev. p. 39</i> § 11,	400
Heirs and Devisees,	<i>Rev. p. 476,</i>	49
Land Improvement,	<i>Rev. p. 568</i> § 3,	509
Mechanics Lien,	<i>Rev. p. 672</i> § 19,	352
Mortgages,	<i>P. L. 1878 p. 139,</i>	69
	<i>P. L. 1880 p. 266,</i>	68
Municipal Corporations—Elizabeth,		519
Trenton,		417
Obligations,	<i>Rev. p. 742,</i>	48
Orphans Court,	<i>Rev. p. 756</i> §§ 19, 20,	121
	<i>Rev. p. 777</i> § 115,	469
	<i>Rev. p. 778</i> § 119,	111
	<i>Rev. p. 791</i> § 176,	123 447
Partition,	<i>Rev. p. 806</i> § 45,	282
Railroads,	<i>Rev. p. 917</i> § 57,	286
Schools,	<i>Rev. p. 1081</i> § 67,	252, 255
Sheriffs,	<i>P. L. 1879 p. 102,</i>	42
Titles,	<i>Rev. p. 1189,</i>	251
Wills,	<i>Rev. p. 1247</i> § 22,	487

Surety.

1. Where the remedy at law against the executors and devisees of a deceased surety on a bond is adequate, equity will, of course, not interfere; and even if there were no remedy at law, equity would not, in the absence of fraud, accident or mistake, give one against the representatives of the deceased surety. *Dixon v. Vandenberg*, 47
2. Sureties stand bound for the defaults and fraud of their trustee, and have no right to any favor or immunity that would not be accorded to him. *Gaston's Trusts*, 60
3. The sureties of a guardian who are released by virtue of an application for relief under the one hundred and twenty-fourth section of the orphans court act, while they are, on the giving of new sureties by the guardian, released from liability for the subsequent acts, defaults and misconduct of their principal, are in no wise discharged from liability for his acts, default or misconduct precedent thereto. Therefore, where a guardian had wasted the estate before the giving of new sureties pursuant to the application of the original ones, the latter were held liable, notwith-

Surety—Continued.

standing the demand for the wasted funds was not made until after the new sureties had been given. *Conover's Case*, 108

4. The surety of a mortgagor will not be released by the mere giving of a collateral bond. *Fireman's Ins. Co. v. Wilkinson*, 160

See GUARDIAN, 1; HUSBAND AND WIFE, 5.

Surrogate.

In fixing the fees allowed to a surrogate for auditing and stating the accounts of executors &c. of estates amounting to more than \$50,000, (in which case they are left, to a certain extent, to the discretion of the court), regard should be had to the work and trouble involved, and such allowance made as will be a fair and just compensation. In this case, on an estate of \$517,000, an allowance of \$750 to the court and surrogate was reduced to \$50. *Pomeroy v. Mills*, 442

T.**Trusts.**

1. A trust "to employ the annual income of the said moneys so invested, and from time to time to be invested, for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund," with a power of appointing and substituting trustees for those named, is a valid charity, and will be executed. *Hesketh v. Murphy*, 23
2. Trustees are bound to keep clear and accurate accounts, and in case doubts or obscurities arise from their failure to do so, they should be resolved against the trustees. If the accounts of a trustee become lost through his carelessness, he should be required to bear any injurious consequences arising from their loss. *Gaston's Trust*, 60
3. A testator gave \$5,500 out of his bonds and mortgages for the support of his daughter, and directed the trustee (his son) to keep the money invested, and to pay her the interest, and so much of the principal, as might be needed for her support. The trustee bought a house with the money, and accounted only for the rents derived therefrom, which were less than the fund would have produced if invested at legal interest.—*Held*, that he must also account for the difference between the rents received by him from the house, and legal interest on \$5,500. *Williams v. Williams*, 100
4. A trust to pay over the interest of a fund to certain persons during their lives, and to divide the principal thereafter, does not devolve upon an administrator *cum test. an.*; nor can such administrator sell lands of the decedent and divide the proceeds as directed in the will, if a personal trust in that respect was confided in the executor. *Lanning v. Sisters of St. Francis*, 392

Trusts—Continued.

5. Lands were conveyed to S. in trust for the use of H. for life, "and at his [H.'s] decease will convey the same to his [H.'s] child or children or their heirs; and further in default of such heirs, the said hereby-conveyed premises to be the absolute property of the said R., his heirs and assigns." H. is dead, leaving two children who are unmarried and without issue.—*Held*, that they are entitled to a conveyance of the lands in fee. *Bruere v. Bruere*, 432
6. The jurisdiction of the court of chancery in reaching property of a judgment debtor does not extend to trust property, where the trust has been created by or the fund so held in trust has proceeded from some person other than the debtor. *Lippincott v. Evens*, 553
7. The sum of \$6,000 was bequeathed to executors in trust, to invest it and pay over the income therefrom to the daughter of the testator, with a provision that in case the daughter should at any time wish a part or the whole of said sum, it should be paid to her. The husband of the daughter owned a farm; became bankrupt; the farm was sold by the assignee, and at the request of the daughter the said executors purchased the farm from the person who had bought it from the assignee. The deed to the executors contained a trust clause to the effect that the daughter should be permitted to occupy the farm and receive the income arising therefrom, and that the trustees should sell to such person as she should appoint. Upon a bill filed by a judgment creditor of the daughter—*Held*, that the farm was held under a trust created by the testator and not by the debtor, and could not be reached. *Id.*, 553

See CORPORATIONS, 8; PARTIES, 2; SURETY, 2.

U.

Undue Influence.

Inequality, or even injustice towards some of a testator's children, in the amounts given to them by the will, does not prove undue influence. It is not enough to prove it to show interest and opportunity. *Turnure v. Turnure*, 437

See PRACTICE, 5; WILLS, 2.

W.

Wills.

1. A testator gave his homestead and a certain legacy to his wife for life, charged on a farm given to his son Andrew. He then made devises to his daughter Sarah, to the children of his daughter Margaret, and to the children of his daughter Temple. He then devised a farm to his daughter Catharine, and added, "And I do further order that the said Catharine shall have an amount of

Wills—Continued.

- money paid to her in addition to the above-said farm, out of my estate, to make her share *equal with the rest of my children named.*" He then gave his residuary estate equally to his other children and their representatives, not before provided for. He then ordered that the property given to his wife be sold after her decease, "and the proceeds of the same shall be equally divided *among my last-mentioned children.*" After the widow's death, the farm given to her for life was sold.—*Held*, that Catharine was entitled to share the proceeds equally with her brothers and sisters mentioned in the residuary clause, the testator's intention being that the proceeds should be part of the subject of that clause. *Lozey v. Westbrook*, 116
2. Undue influence over a testator must be satisfactorily established by other evidence than his declarations, although they are admissible to show the extent and effect of such influence. *Rusling v. Rusling*, 120
 3. The will in this case sustained, but not the codicils, they being held to have been executed while the testator was suffering under senile dementia. *Id.*, 120
 4. A devise of "my house, * * * No. 160 Rose street, * * * to M. and A. for life, and after both shall have died the house or property shall be sold" &c., passes not only the house, but all of the lands surrounding it which had been used therewith by testatrix's grantor, the whole property having been conveyed to the testatrix by one deed, and subsequently used and enjoyed by her in the same way. *Lanning v. Sisters of St. Francis*, 392
 5. A gift was to "Joseph C. Link's children, Mary and Sethe Link." Joseph C. Link had only two children, Mary and Sarah, who was called in the family Sadie. The will was drawn by a German.—*Held*, that Sarah was intended by the name "Sethe." *Id.*, 392
 6. Where a will contained the usual attestation clause, and the witnesses were not asked, on the trial, whether the testator did or did not make a publication of the instrument as his will when they attested it, but it appeared that, when they were requested to witness it, it was spoken of as the testator's will, and one witness testified that the other told him, in the presence and hearing of the testator, what the paper was, and it appeared also that the will had been read aloud, in the presence of the testator (who expressed his approval of it) and of all of the witnesses, before it was signed—*Held*, that there was sufficient evidence of publication to warrant probate. *Turnure v. Turnure*, 437
 7. The declarations of a testatrix, either before or after the making of her will, are not competent evidence to prove fraud in obtaining it. *Kitchell v. Beach*, 446
 8. The testator's power to make discrimination in the distribution of his property, constitutes no small part of the value of the testa-

Wills—Continued.

- mentary right, and therefore considerations of inequality in such distribution are not to be entertained, where there is competency and no fraud. *Id.*, 446
9. Habits of drunkenness do not, of themselves, take away testamentary capacity, although such habits produced the disease of which testator died a few weeks after making his will. *Kahl v. Schober*, 461
10. It is not enough to deny probate to a will, that it does not appear affirmatively that it was read over to or by the testator before he executed it, where it does not also appear that it was *not* read over to or by him then, and it further appears that he was then capable of reading it, and fully understood its contents, which were in accordance with his instructions, and there is no proof of fraud or imposition. *Id.*, 461
11. A decedent went into a store to execute his will. His brother James was there, and also Mr. Harrison and Mr. Miller. James said to Harrison, in the hearing of the decedent, "My brother has been making his will, and I would like to have you witness it," to which Harrison replied, "All right." The decedent, James and Harrison then went into a small enclosure or desk, with glass around the top, so that persons inside of it were visible to others in the store. James said to Harrison, "This is my brother's will, I would like to have you witness it," whereupon decedent signed it, and Harrison, who saw him sign it, also signed as a witness. James then stepped out of the enclosure, and going to Miller, who was engaged at a counter about ten feet away, said, "Mr. Miller, Mr. Harrison has been kind enough to witness my brother's will, now I want you to," and then Miller went into the enclosure where decedent remained (Harrison having stepped out to make room for Miller), and signed his name to the will as a witness. Before James asked Miller to sign, the latter did not know that decedent was signing his will, although he surmised so because James had told him, a few weeks before, that his brother was coming there to execute his will, and that he (James) would like him (Miller) and Harrison to witness it. Miller testified that he thinks decedent heard James request him to witness the will. Miller did not see decedent sign nor hear him acknowledge his signature to the will.—*Held*, that there was no publication of the will by decedent in Miller's presence, and therefore that there was no execution of it, in compliance with the statute. *Ludlow v. Ludlow*, 480
12. A testator gave to J. "the amount of his indebtedness to me, which now amounts to \$8,500." J. owed the testator individually \$8,566.30, and, jointly with another person, \$1,000.—*Held*,

Wills—Continued.

that only the individual debt was given. *Heaton v. Merchant's
Executors,*

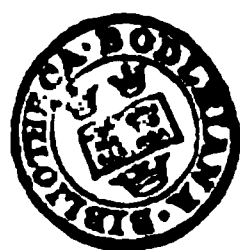
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